111-356

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 297.

ANTON EILERS, APPELLANT,

vs.

N. C. BOATMAN, E. M. VARNES, AND E. SELLS, RESPONDENTS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF OF APPELLANT.

C. K. GILCHRIST, Attorney for Appellant.

TRIBUNE PRINTING CO.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1883.

ANTON EILERS,
Appellant,
vs.
N. C. BOATMAN, ET AL,
Respondents.

BRIEF OF APPELLANT.

This was an action brought by Eilers in the Third District Court of Utah Territory, the locator of the Virginia Mining Claim, upon his protest against the application of Boatman and others for a patent for the Nabob Claim. Each party alleged possession of the conflict premises. The respondent had judgment and appellant appealed to the Supreme Court of Utah, where the judgment of the Court below was affirmed, and the appellant prosecutes his appeal to this Court.

The Court below found the following conclusions of law, each of which is assigned for error in this Court :

1st. That the notice of the location of the Nabob Mining Claim contained a sufficient description by reference to natural objects and permanent and well-known monuments to identify the same.

2d. That the said Nabob Claim was so marked on the ground that its boundaries could be readily traced.

3d. That by reason of the prior location of the Nabob Mining Claim, and a compliance in respect thereto with mining laws and customs by the defendants, the defendants at the commencement of the action were and still are entitled to the possession of the area in conflict with the Virginia Claim, and are now entitled to judgment for said area and costs. (See Record, page 8.)

I.

Appellant claims that the ground in conflict was not subject to location by respondents at the time their alleged notice of location was posted. At the date of their pretended location and for a long time prior thereto, the Flagstaff Mining Company was in actual possession of the lode and conflict ground, and working the same. (See record pp. 10 and 11.)

Respondents could not make a valid location on a lode in the actual possession of another, whether such possession was lawful or not.

Mitchell vs. Hagood, 6th Cal. 148.
Atherton vs. Fowler, 6th Otto, 518.
Hosmer vs. Wallace, 7th Otto, 575.
Governeur's heirs vs. Robertson, 11 Wheaton, 355.
Orr vs. Hodgson, 4 Wheaton, 453.
Jackson vs. Beach, 1 Johnson's Cases, 309.
Dudley vs. Grayson, 6 T. B. Moore, Ky., 260.
Jackson vs. Lund, 3 John's Cases, 112.
Marshal vs. Conrad, 5 Call, Va., 364.
Montgomery vs. Dorlan, 7 N. H., 475.
Laurens vs. Jenney, 1 Spear, S. C., 356.
Grove vs. Gordon, 3 Brevan, 245.
Evans vs. Franklin, 2 Brevan, 398.
Vaux vs. Nesbitt, 1 McCord, C. R., 352.

Fairfax vs. Hunter, 7 Cranch, 603, 620.
Sheafe vs. O'Neil, 1 Mass., 256.
Fox vs. Soothack, 12 Mass., 143.
Com. Dig., "Alien" C., 4.
Shep. Touch, 232.
Ostram vs. Baldwin, 6 Wall., 121, 122.

The respondents admit the principle but deny the application of it to this case. The findings on this subject are to be found on page 7 of the Record. This finding No. 2 goes to the extent, and *no further*, that the claimants of the Nabob were in possession of this claim when the Virginia was located; even the word "shanty" does not aid the finding. Not one word is said as to who was in possession of the Nabob at the time the suit was commenced or when the trial was had. The statutes of Utah do not authorize the bringing of a suit to quiet title when the complainant is not in possession of the property at the time of commencing the action. Compiled Laws of Utah 1876, p. 477, Sec. 254.

Hardin vs. Jones, 5 Reporter (Boston) p. 332.

(The law is different in California and some other Western States and Territories.) In California suits may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim; no allegation of possession is required.

Harston's (California) Practice, Sec. 738, p. 339.

And when the defendants set up new matter in their answer, constituting a supposed defense, alleging a prior location of mining claim, compliance with the mining laws and regulations and praying for affirmative relief as against the plaintiff, then such defendants became the actors in regard to such defense, and the same rules apply to them as to the plaintiffs. In theory as to such new matter they became the plaintiffs, and are subject to like rules of law and practice. The Court below seems to have ignored this principle entirely. The possession of the premises in dispute was one of the controverted questions in this case (see Answer, Record p. 4) and when the Court undertook to decide the issues for the

defendants, it was bound to find on the point whether they were in possession of the premises at the time of filing the answer. To sustain the reverse of the position here contended for was manifest error by the Court below.

The learned Judge of the Court below who wrote the opinion in this case, saw the force of this reasoning, (see Vol. 2, Pacific Reporter No. 1, p. 72, last clause) and undertook to bridge the chasm, but the *Nisi Prius* Court, not having found *any facts* on the subject, his planks were "too short," and his reasoning must fail.

II.

The prominent features of this discussion are:

The notice of location of the Nabob Claim as posted and recorded in the said Mining District is insufficient either as a *notice* or a *record* to indicate the existence of any lawful claim.

The locators of the Nabob did not define or work out their boundaries.

This requirement of the mining act is imperative.

Kahn vs. Old Telegraph, 2 Utah R., 199.

Hess vs. Winder, 30th Cal., 349.

Holland vs. Mount Auburn Co., 53 Cal., 159 and also 217.

Mining Act. 1872. Rev. Statutes U. S. § 2324.

Copps U. S. Mineral Lands p. 15, § 2324.

Defining boundaries is a condition precedent to acquiring any right under the Mining Act.

Fitzpatrick vs. Dubois, 2 Sawyer, C. C. 66, 435.

Mt. Diablo vs. Gallison, 5 Sawyer, C. C. 449-454-455.

Hanswirth vs. Butcher, 1 Pacific Reporter, (No. 5,) p. 714, etc.

Gleeson vs. White Co., 13 Nevada, 462.

Leggatt vs. Stewart, 2 Pacific Reporter (No. 3) p. 320, etc.

The spirit of all these decisions go to show that courts in mining regions are not disposed to refine away the plain provisions of Section 2324 of the Statutes of the U. S., commonly called the Mining Act of 1872.

What are the provisions of that act as applicable to the case at bar:

1st. The location must be distinctly marked on the GROUND, "*so that its boundaries can be readily traced.*"

2d. All records of mining claims hereafter made *shall contain* the name or names of the locators, the date of the location, *and such a description of the claim or claims located*, by reference to some *natural object or permanent monument as will identify the claim.*

In the first place it is to be observed that nowhere in the findings is it stated *what the Court found to be the width* of the Nabob Claim. In fact the record is silent as to the fact whether the claimant made *any claim to surface ground* whatever. (See Record, pp. 6 and 7, Findings 1-2-3-4.)

The finding on the point as to what was done on the ground towards the location is: " * * * The defendants located the Nabob Mining Claim * * * upon a lode of rock in place * * * the claim consisting of 1500 feet in length, to-wit, 50 feet southeasterly from the discovery point and 1450 feet northeasterly from the same point." (See Record, pp. 6 and 7.

Is this a marking of a claim *distinctly* "on the *ground* so that its boundaries can be *readily traced?*"

I think not. So much in relation to what the Court found as to what was done or appeared "*on the ground.*" We fail to see any claim for surface ground here.

Now, how about the notice filed for record?

The finding (Record p. 7) goes on to state "that the notice of location * * * described the same as situated on Flagstaff Hill about 150 feet, *more* or *less*, westerly from the discovery shaft of the Flagstaff Mine, and about 36 feet *more*, or *less*, northwesterly from the northerly side line of the Rough & Ready patented ground, and the *metes* and *bounds were therein stated to be described* by a stake driven 50 feet southeasterly from the discovery shaft, marked No. 1; *thence* running northwesterly 500 feet to a red-pine stump blazed on the north side; *thence* to a tree over the divide, marked 900 feet; *thence* to a point 600 feet distant, in Day's Fork."

It will be observed that there is not one word in reference here to *surface ground.* Now, then, the question recurs, does

this record of the notice of location of the Nabob contain such a "*description*" of the claim "by reference to some natural object or permanent monument *as will identify the claim!*" I contend that it does not.

The fourth finding, found on page 7 of the Record, does not aid the location or the notice, because the *width* (and hence the boundaries of the claim) are nowhere stated. To my mind the location and notice of location of the Nabob were both equally illegal and void. If so, then the conclusions of law found by the Court were manifestly error. (See Record p. 8, top of page.)

I am quite well aware of your rules, that with questions of fact the Appellant Court of the United States does not deal, so far as relates to the Territories; but findings of law as applied to facts found by an inferior Court may be assigned for error in this Court. Now, then, take the third finding of law, found on page 8 of the Record, and what does it contain? After stating that the Nabob was the prior location, it goes on to state, "and a compliance in respect thereto with the "mining laws and customs by the defendants, the defendants "at the commencement of the action were and still are en- "titled to the possession of the area in conflict with the Virginia Claim."

The learned Judge who wrote the opinion in the Court below seized hold of this portion of said finding to support the judgment. This, of course, was wrong; *it was manifest error.* To supplement findings of fact with the conclusions of law, when the Practice Act requires them to be stated separately, (see Compiled Laws of Utah, p. 449, Sec. 180,) is a most unlawful way to override a pivotal point in a case. Nowhere in the findings of facts is it stated or hinted that the mining laws and customs had been complied with by the defendants, the Nabob claimants. These facts were in issue by the pleadings, the defendants alleged such compliance in their answer, and such allegation stood controverted on the trial, no reply or replication under the Utah practice being required. To apply conclusions of law to *facts not found* will strike the Court as something novel in chancery practice.

III.

This judgment cannot be sustained because there is no finding of fact that the defendants, Boatman, *et al.*, were in possession of the property in controversy at the time of filing the answer, or at the commencement of the action.

Curtis vs. Sutter, 15 Cal., 264.
Geleich vs. Moriarty, 53 Cal., 220.
Lyle vs. Rollins, 25 Cal., 437, 440.
Brooks vs. Calderwood, 34 Cal., 565.
Sepulveda vs. Sepulveda, 39 Cal., 18-19.

This point was distinctly made in the Court below, and is assigned for error here. Moreover, it is a jurisdictional question in this class of actions, and can be taken advantage of at any time.

From these considerations I maintain that the judgement of the Court below should be reversed, and the case sent back for trial *de novo*.

C. K. GILCHRIST,
Attorney for Appellant.

111-356

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 297.

ANTON EILERS,
Appellant.

vs.

N. C. BOATMAN, E. M. VARNES, and E. SELLS.
Respondents.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

BRIEF FOR RESPONDENTS.

C. W. BENNETT.
Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 297.

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N. C. BOATMAN, E. M. VARNES, and E. SELLS,
Respondents.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

In behalf of Respondents, this case is submitted without oral argument.

The Respondents applied for patent for the Nabob Mining Claim, according to the survey shown on Plat "B", in the transcript, which is the plat used by Respondents on the trial.

Appellant, as the owner of the Virginia Mining Claim, protested and brought suit. The pleadings are general, each party claiming title, by virtue of the respective locations, to the area in conflict.

Afterward Appellant applied for patent for the Virginia, and the Respondents made a cross protest and brought a cross suit. This second application for the same ground was irregular under later rulings of the land office, but was then allowed. By stipulation, (Tr. p. 17) the latter suit abides the event of the one now before the court.

The case was tried by the court without a jury, and findings of fact and of law were made, (Tr. pp. 6, 7, 8) to which there was no

objection for insufficiency, and no request for further or other findings, and judgment accordingly was entered, (Tr. p. 8.)

Appellant's statement for motion for a new trial (and which by stipulation became a statement on appeal,) contains only a brief statement of the evidence and no part of the evidence at large.

Appellant has served no brief and we can only notice the assignments of error in the transcript, p. 16.

First. The first assignment of error is that the evidence is insufficient to justify the findings, in two respects; that the boundaries of the Nabob were not established until after the location of the Virginia, and that the notice of location of the Nabob is insufficient. The findings of fact are in the nature of a special verdict and the evidence will not be reviewed. Sec. 2, Ch. 80, 18 St. ph. 3, p. 27.

This statute refers to findings or statements of fact made by the court, and does not seem to include such statements of the evidence as may be agreed to by the parties on motion for a new trial.

If, however, the statement of the evidence be considered, it is adequate to support the finding.

No question is made but that the Nabob is the older location, and that the southeasterly 900 feet was marked on the ground as recited in the finding, and that the northwesterly 600 feet is inaccessible. The Virginia does not conflict with the inaccessible part.

The ground as far as 900 feet was sufficiently marked.

North Noonday vs. Orient, 6 Sawyer, 299.

Gleason vs. Martin, White Co., 13 Nev. 42.

The appellant cannot claim he was honestly misled to his injury.

The Virginia locators found the southeasterly centre end stake, and saw the discovery stake with the notice on it. There was a shanty at the discovery point and men there sinking the discovery incline. They had in their hands the Nabob notice. There is nothing in the notice to show any change of direction, and a line drawn through the two stakes they saw would strike the 500-foot marked stump, and the 900-foot marked tree. They were within 50 feet of these men, made no inquiry, but were led off to see stumps and trees in a direction which would require a change of course or a displacement of one of the stakes they saw.

Appellant's Plat "A" shows where he claims the Nabob was

located, and the only evidence that it was so located is that stumps and trees were found marked, as one witness says, "miscellaneously." There is no doubt but that after the location of the Nabob, some one attempted to confuse the boundaries, and for a purpose hostile to the interest of that claim, and the Virginia locators were willingly shown those marks. The direct affirmative evidence of of the locators and others as to the true line was abundant on the question of fact, and showed either intentional bad faith in the locators of the Virginia, or such negligence as deprives them of the character of locators in good faith.

The second branch of this assignment relates to the sufficiency of the Nabob location notice.

The stipulation to the statement (Tr. p. 16) contemplates the notice shall be made part of it, but appellant has not included it in the Transcript. The substance of the description is recited in the first finding of fact, page 7.

The United States law does not require any notice or record, but prescribes what the record shall contain, if a record is required by local laws. There is no proof of any local law requiring a notice or record of a notice.

Golden Fleece vs. Cable Con. Co. 12 Nev. 312.

In the absence of such local law, the location consists in taking possession of, and marking on the ground, and thus severing from the public domain, the ground claimed. The marking on the ground, as recited in the finding, was sufficient. The locators were in the actual possession of the disputed ground, and that alone was sufficient to prevent another location of that much of the claim, and put the appellant on inquiry as to the rights and bounds of the occupants.

The first and second assignments of errors in law are in pursuance of the assignments of error in fact, and have been sufficiently noticed.

The third assignment of error in law is based on the claim that the Nabob could not be located on a vein, if at depth, lower parts of the same vein were occupied by a mere trespasser on Government lands.

The vein crosses the Flagstaff, runs southeasterly through the South Star and Titus, the Vallejo, the North Star and Emma min-

ing claims; and northwesterly into the Nabob. The Flagstaff, claiming 2,000 feet of the vein, had worked southeasterly by works not shown on Plat B and northwesterly under the dip from the Nabob. See 2d level from Tunnel incline, Plat "B." This claim of the Flagstaff was adversely determined in a case relating to the southeasterly work.

Flagstaff vs. Tarbet, 99 U. S. 463.

The decision in Belk vs. Meagher, 104 U. S. 279, is only to the effect that a location of a mining claim is void, while it is held under a *prior valid location*.

The contention of appellant, if good, would defeat his own title as well as that of respondents.

There must be some limitation to the right to plead or prove the right of third parties, and we assume such rights are immaterial unless they either better the standing of the party showing them, or establish a liability to such third party instead of to the adverse party to the action. If the Flagstaff had a location of this ground, valid at the time of the location of the Nabob, but void when the Virginia was located, the prior right of the Flagstaff would better the standing of the appellant and be vital to his claim and bring his case within the principle of Belk vs. Meagher. No such state of facts is shown.

We respectfully submit the judgment should be affirmed.

C. W. BENNETT,
Counsel for Respondents.

111-358

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1083.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, JOHN T. FLINT, W. R. KELLUM, RICHARD COKE, ET AL., APPELLANTS.

vs.

THOMAS M. SHIRLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 10, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1083.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY, JOHN T. FLINT, W. R. KELLUM, RICHARD COKE, ET AL., APPELLANTS.

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FILED OCTOBER 10, 1883.

INDEX.

	ORIGINAL.	PRINT.
Caption	1	1
Petition	1	1
Amendment to petition, December 1, 1877	9	8
December 28, 1877	12	11
January 12, 1878	14	13
January 12, 1878	18	16
Exhibit "A."—Agreement between Thomas M. Shirley and W. T. R. R. Co.	19	17
Exhibit "B."—Letter of E. L. Herriot, chief engineer, to Thomas M. Shirley, March 23, 1870	24	21
Exhibit "C."—Letter of Jno. T. Flint, president, &c., to E. L. Herriot, chief engineer, March 18, 1870	24	22
Exhibit "D."—Telegram of Jno. T. Flint, president, &c., to Thomas M. Shirley, April 2, ——	25	22
Exhibit "E."—Advertisement in newspapers	25	22
Consolidated and amended original answer of W. T. R. R. Co.	25	23
H. T. C. Ry. Co.	35	31
Exhibit "A."—Agreement between W. & N. W. R. R. Co. and H. T. C. Ry. Co.	48	42
Exhibit "B."—Supplemental agreement	53	46
Exhibit "C."—Bond of W. & N. W. R. R. Co.	56	49
Exhibit "D."—Deed of trust to secure bond	56	50
Order granting permission to withdraw part of petition	61	54
Verdict and judgment	63	55
Motion for new trial	64	56

	ORIGINAL.	PRINT.
Appeal bond	67	58
First amended original consolidated petition	70	60
Exhibit "A."—Agreement between Thomas M. Shirley and W. T. R. R. Co.	79	81
Exhibit "B."—Letter of E. H. Herriot, chief engineer, to Thomas M. Shirley, March 23, 1870	81	85
Exhibit "C."—Letter of Jno. T. Flint, president, &c., to E. L. Herriot, chief engineer, March 18, 1870	81	85
Exhibit "D."—Telegram of Jno. T. Flint, president, &c., to Thomas M. Shirley, April 2, ——	82	86
Exhibit "E."—Advertisement in newspapers	82	86
Petition	84	89
Supplemental petition, December 16, 1872	109	98
December 17, 1872	111	98
Amended petition, December 1, 1874	116	100
April 22, 1876	123	103
December 21, 1877	132	106
December 28, 1877	142	110
January 12, 1878	153	114
January 16, 1878	158	116
January 16, 1878	159	116
Motion for leave to amend	160	117
Amended petition, November 15, 1878	161	117
Answer	164	118
Amended answer, April 23, 1874	176	123
April 24, 1874	178	123
Verdict	182	124
Petition for writ of error	183	125
Exhibit "C."—Copy of verdict and judgment, February 4, 1875	184	125
Bond for writ of error. (State Court.)	191	128
Answer of H. T. C. Ry. Co.	194	129
Answer of H. T. C. Ry. Co.	196	130
Amended answer of H. T. C. Ry. Co.	222	139
Mandate of Supreme Court of Texas, March 16, 1877	229	141
June 28, 1881	230	142
Citation to W. R. Kellum	233	143
W. R. Baker	236	144
W. J. Hutchings	239	145
Paul Bremond	242	146
F. A. Rice	245	147
A. Groesbeck	249	149
R. M. Elgin	252	150
C. Ennis	256	151
R. Coke	259	152
J. T. Flint	262	153
Waco Tap R. R. Co.	266	155
Answer and demurrer of Richard Coke et al.	268	155
Petition for removal to U. S. Court	269	156
Bond for removal to U. S. Court	273	158

	ORIGINAL.	PRINT.
Order for removal to U. S. Court	277	159
Clerk's certificate	277	159
Motion to remand to State Court	280	160
Order remanding to State Court	283	161
Notice of appeal	285	162
Petition to fix bond	287	163
Bond	288	163
Citation and return	292	164
Clerk's certificate	294	165

1 THE STATE OF TEXAS, }
McLennan county. }

At a term of the district court begun and holden within and for the county of McLennan, at the court-house thereof in the city of Waco, on the first Monday in November, (being —— day of said month,) A. D. 1878, and ending on the 21st day of December, A. D. 1878, before the Honorable L. C. Alexander, judge of the 14th judicial district, and presiding judge of said court, the following cause came on for trial, to wit:

T. M. Shirley
vs.
Waco Tap R. R. Company. } No. 1779.

District court, McLennan county, May term, 1878.

Thomas M. Shirley
vs.
Waco Tap R. R. Company. } No. 1779.

Original Petition.—Filed July 16th, 1870.

And now at this term comes the plaintiff, and under leave of court amends his original and amended petitions and consolidates them into one, and says:

Your petitioner, T. M. Shirley, a citizen of Harris county and state of Texas, complains of the Waco Tap Railroad Company, a corporation chartered by the legislature of the state of Texas, by an act entitled "An act to incorporate the Waco Tap Railroad Company," approved November 5, 1866, and having its principal office at Waco, McLennan county, Texas, for this:

That on or about the 29th day of July, 1869, he entered into a contract with said Waco Tap Railroad Company (hereafter designated by the letters W. T. R. C., being the initial letters of the name of said Waco Tap Railroad Company,) which was then reduced to writing and signed by himself and J. W. Speight, as president of said company, for said W. T. R. C., and which said contract your petitioner is informed and believes was afterwards approved and countersigned by the board of directors of said W. T. R. C., and that by a resolution of said board of directors said contract was approved and accepted by them, a substantial copy of which contract
2 is hereto attached, marked "A," and made a part of this petition.

In consideration of the payments, rights and profits, as specified in said contract, your petitioner agreed and bound himself to form, prepare, finish and execute in a thorough and workmanlike manner the clearing, grubbing, excavating, embankment, trestling, surfacing, track laying, and to furnish the cross-ties for the road of the said W. T. R. C. entire, from the junction of said road with the Houston

and Texas Central Railway Company's road to the town of Waco, both points being in the state of Texas.

In said contract your petitioner bound himself to begin work on said road on or before the first day of September, 1869, which time was extended for twenty days afterwards at request of your petitioner, and to complete and finish said work on or before September, 1871, making in the aggregate two years of time within which to fulfil the terms of said contract. And it was further agreed that said work should be done according to certain specifications, which were in writing, and attached to said contract, and such additions or alterations of the work as the engineer of said company might consider expedient were to be made upon the terms of the original contract.

Your petitioner bound himself in said contract to said W. T. R. C. to pay all damages that might accrue by a failure to complete the work in the time specified; and also, that after proper notice to increase his working force, to pay damages for such failure; and further, said W. T. R. C. might reserve fifteen per cent. out of each monthly payment to your petitioner under said contract; and if the work was not performed to the satisfaction of the engineer of said W. T. R. C., then the whole of each monthly payment should be held by said W. T. R. C. until said work was properly done; and your petitioner bound himself in a bond, with two sureties, approved by the said president, in the penal sum of one hundred and fifty thousand dollars for the faithful performance of the entire contract.

That by said contract said W. T. R. company was bound and agreed to pay to him, in American coin, meaning the legal coined currency or money of the United States, at the office of the said W. T. R. company in Waco, Texas, for said work done under said contract, at the rate of twenty-five cents per cubic yard for excavating and embankment in common clay or earth; for hard pan, or such other material not herein specified as cannot be removed in greater quantities than six cubic yards per day by an experienced, first-class railroad laborer, forty cents per cubic yard; excavating in loose rock, seventy-five cents per cubic yard; excavating in solid rock, one dollar and ten cents per cubic yard; grubbing, per chain of one
3 hundred feet, five dollars; clearing two hundred feet wide, three hundred and fifty dollars per mile; cross-ties, forty-five cents each; trestling, six dollars and fifty cents per lineal foot; surfacing, one hundred and fifty dollars per mile; track laying, five hundred and fifty dollars per mile.

It was further agreed in said contract that the said W. T. R. C. should pay your petitioner each month during the progress of the work such an amount as the engineer should estimate to be a fair average value of the work done each month, agreeable to said contract; and of that amount so estimated the said W. T. C. R. agreed to pay your petitioner eighty-five per cent., and when the whole work as contracted for should have been accepted by the engineer and completed agreeable to said contract, then the whole should be paid to your petitioner, including the fifteen per cent. that had been

reserved. It was further agreed in said contract that for the purpose of securing to your petitioner the fifteen per cent. which was to be retained by said W. T. R. C. out of each monthly estimate, as well as any other sum that might be due and unpaid by said W. T. R. C., that the said W. T. R. C. would execute and deliver to your petitioner a proper mortgage, in good and sufficient terms, upon the road-bed, superstructure, rolling stock, land, franchises, and other property, the said mortgage to be duly executed as soon as the reserved fifteen per cent. on the work done should amount to the sum of twenty thousand dollars, which mortgage was to become due and payable upon the final completion of the work, and at the end of each and every month said W. T. R. C. was to make, execute, and deliver its promissory note in writing, to bear ten per cent. interest, for whatsoever sum may be due upon each monthly estimate, as well as also to include the reserved fifteen per cent.

It was further agreed by the parties in said contract that your petitioner, with the approval of the president of said W. T. R. C., might purchase iron, rolling stock, meaning locomotive and cars, and other property necessary to run said W. T. R. company, and put the same in operation, if your petitioner saw fit to do so, and should have the privilege of operating the same, and be entitled to all the profits, without account to the said W. T. R. company, arising from said business of said road, until all claims, debts, and just demands of whatever kind of your petitioner be fully satisfied, paid, and discharged; all which your petitioner had intended to do, and said W. T. R. company agreed to make, execute, and deliver to your petitioner the said W. T. R. company's promissory note or notes in writing for said iron, rolling stock, etc., as aforesaid, and to secure by mortgage in like manner as the other indebtedness to your petitioner as aforesaid.

It was further agreed by said W. T. R. C., and it obligated
4 itself that when the road was completed and finished in sections of ten miles to provide iron, an engine and necessary cars to run the road for that distance, and to haul the supplies, distribute iron, ties, etc., for your petitioner; and it was further agreed that your petitioner should have the right to construct the bridge for said W. T. R. C. across the Brazos river, upon such terms as might thereafter be agreed upon between the parties to said contract, and such agreement when made should be a part of and subject to all the terms and securities of the original contract.

It was further agreed, and the said W. T. R. C. was obligated in said contract, that if the work of your petitioner should be suspended by said W. T. R. C., or this contract plainly violated on the part of said W. T. R. C., then in either or both such cases all sums due the contractor, as well as the reserved fifteen per cent. retained, should become due and payable, and the aforesaid mortgage should be foreclosed at once, and it was agreed that the mortgage should be so drawn that in the event of such contingency it might be foreclosed

without delay, or involving your petitioner in litigation or expense to obtain his just demands.

It was further agreed, and your petitioner obligated himself to said W. T. R. C., that when said W. T. R. C. had paid or secured to your petitioner under said contract the sum of one hundred and fifty thousand dollars, then your petitioner would advance to said W. T. R. C. twenty-five thousand dollars, or would perform work under said contract to that amount, and when said W. T. R. C. should have paid or secured the further sum of fifty thousand dollars, then your petitioner bound himself to advance the further sum of twenty-five thousand dollars in work as aforesaid; and when the said W. T. R. C. should have paid or secured to your petitioner to within one hundred thousand dollars of whatever sum might be required to complete the said W. T. R. company's road, then your petitioner obligated himself to complete the entire road, as contemplated and specified in said contract, and was to run, control and operate said road after being so completed and be entitled to all the profits from the same as aforesaid, all which your petitioner was ready and intended to do. And the said W. T. R. company bound itself to make, execute and deliver to your petitioner their good and sufficient mortgage, with power of sale, to secure said advancements in the same manner and terms as the mortgage already provided for in said contract.

It was further agreed that the said W. T. R. company was bound that its president and directors should do all in their power to aid your petitioner in obtaining labor, supples, timber, etc., and to lend their cordial support and influence to facilitate the contractor in every way in the prosecution of the work, and said W. T. R. C. was bound that in case your petitioner should refuse or neglect to perform all the covenants enumerated in said contract, that, upon said W. T. R. C.'s engineer's certifying such fact to the president of said W. T. R. C., the president might, at his option, after careful investigation and due notice in writing to your petitioner, and after his refusal to remedy the evils complained of, declare this contract null and void.

Your petitioner avers and charges that when this contract was reduced to writing certain specifications were also reduced to writing and signed as aforesaid. Said contract and specifications were not signed in duplicate, but the said W. T. R. C. kept the originals and gave your petitioner merely a copy of said contract and specifications, which is incorrect, and your petitioner avers that said original contract and specifications, as signed by your petitioner, is now in the possession of said W. T. R. C., and notice is now given to produce the same on the trial of this cause, or secondary evidence of its contents will be introduced.

Your petitioner avers that he began work upon said road under the terms and agreements of said contract during month of September, 1869; that he had on said road a sufficient force of hands, equipments and supplies, and that he kept such force at work, faith-

fully fulfilling all the terms and requirements of said contract, and was able and fully intended so to do until said road was completed; and not having received notice or intimation of dissatisfaction on the part of the said W. T. R. C., he believed said W. T. R. C. fully satisfied with his work and manner of complying with said contract.

Your petitioner avers and charges that on or about the 26th day of March, 1870, your petitioner received a letter through the post-office at Houston, Texas, dated Waco, March 23, 1870, and signed E. L. Herriot, chief engineer, which said letter is hereto attached marked "B," and made a part of this petition, which said letter was accompanied by a copy of a resolution passed at Waco March 18th, 1870, by the board of directors of said W. T. R. company, and an order from J. T. Flint, the president of said W. T. R. company, to E. L. Herriot, chief engineer of said W. T. R. company, certifying that the copy was correct and to be observed by said engineer, a copy of which said resolution is hereto attached marked "C," and made a part hereof. Said resolution was in effect an order that your petitioner put one hundred hands at work on said road within fifteen days from the date of said resolution, and to keep that number constantly at work; and a failure to do so on the part of your petitioner would be considered a violation of the said contract.

6 Your petitioner avers that on the 2d day of April, 1870, he received a telegram from J. T. Flint, president of said W. T. R. C., dated 2d day of April, 1870, which telegram is hereto attached marked "D," and made a part hereof, which said telegram was signed by said J. T. Flint, president of said W. T. R. C., and in effect declared the entire contract between your petitioner and said W. T. R. C. null and void, and declared that your petitioner would be no longer recognized as a contractor on said road by said W. T. R. C.

Your petitioner avers that on or about the 6th day of April, 1870, after the receipt of said letter, telegram and resolution as aforesaid, at Calvert, Texas, at which time and place your petitioner met said J. T. Flint, who was then president of said W. T. R. C., and acting as such president, and during which interview your petitioner complained to said president that all said acts of the board of directors of said W. T. R. C., himself as president, and said E. L. Herriot as chief engineer of said W. T. R. C., were illegal and void, and doing a great wrong and injury to your petitioner; and at the same time and place your petitioner demanded of said president to point out wherein said contract had been violated by your petitioner, and if it had been violated in letter or spirit, to then and there proceed to make complaint through the proper officer, and to follow out the provisions of said contract. And your petitioner offered to execute a new bond in a greater penalty if said president required it; but said president answered nothing, and left your petitioner without showing any violation of said contract, and without giving notice as required by said contract.

And further, said president went immediately on the line of the

road of said W. T. R. C., and to the employees of your petitioner, and notified all persons on said road that your petitioner would be no longer recognized as contractor, and that all work done on said road thereafter was in the direct employ of said W. T. R. company; and thereby forcibly, illegally, wrongfully and maliciously took possession of your petitioner's said work, and said line of road from Bremond, in Robertson county, Texas, to Waco, in McLennan county, Texas, and all the premises, surveys and lines as specified and understood in said contract, and the specifications thereto attached; and said president then forcibly and maliciously, and still does to this day, prevent your petitioner from carrying out the letter, spirit or terms of said contract; and the said W. T. R. company ratified all the said acts of its president, J. T. Flint, so done and performed.

Your petitioner avers that at the time of said forcible entry of said president he had contracts perfected and in negotiation for a larger number of workmen to go on the line of said
7 road than was called for by said resolution, and that he had supplies purchased to subsist said workmen for two months, a part of which was then at Calvert, a short distance from his work, then terminus of the Houston & Texas Central Railway; all which he notified said president and said chief engineer, and then and there, at said interview as aforesaid, notified said president that he was able, prepared, and expected to go on to complete said contract.

Your petitioner avers and charges that he has been greatly wronged and damaged by the said illegal, forcible, and malicious acts of said W. T. R. company through its president and board of directors, in this:

That there is due and owing to your petitioner from said W. T. R. company the reserved fifteen per cent. which said W. T. R. company retained out of each monthly payment, on such monthly payments as said W. T. R. company had made to your petitioner, amounting in the aggregate to about three thousand dollars, with interest, and there is due and owing and unpaid to your petitioner from said W. T. R. company the sum of ten thousand dollars, with interest, for work and labor done and performed at the instance, request, and for the benefit of said W. T. R. company under said contract, all which sums your petitioner has often requested said W. T. R. company to pay to him, but said W. T. R. company has wholly failed, refused and neglected to pay the same or any part thereof, to the damage of your petitioner twenty thousand dollars.

Your petitioner further avers that he has been greatly damaged in this: By said forcible, violent and malicious breach of said contract, that he is prevented from completing the same or fulfilling his obligations thereunder, thereby depriving him of all profits, advantages, and benefits that would have accrued to him thereunder, to wit: The profits upon the excavating, in common earth or clay, which would have been about twelve and one-half cents per yard; the profits for excavating in hard pan, as specified in said contract, which

would have been about twenty cents per yard; the profits in excavating in solid rock, at about fifty cents per yard; the profits in grubbing, which would have been about two dollars and fifty cents per each one hundred feet; the profits in clearing, which would have been about two hundred dollars per mile; the profits on the cross-ties, which would have been about twenty-five cents each; the profits on surfacing, which would have been seventy-five dollars per mile; the profits upon laying the track, which would have been about three hundred dollars per mile; the profits on trestling, which would have been about two dollars and a half per lineal foot; said road of W. T. R. company as surveyed at the date of said contract, and as understood and agreed under said contract, being about
8 fifty miles in length, to extend from Bremond, Robertson county, to Waco, McLennan county, both in Texas, all which said profits would have accrued to your petitioner, and were in contemplation and understood by the parties when said contract was entered into, through the payments to be made by said W. T. R. company, and were to be paid in the legal coined money of the United States of America.

And further, that he has been damaged in this: the loss of the profits to be made by running said road of the W. T. R. company, after said road was being constructed as specified in said contract; and the profits to be made in building the bridge across the Brazos river for the said W. T. R. company, as specified in said contract; all which said profits in the construction of said road, with the profits of running the same for the use of the public, and building said railroad bridge and including what is due and owing your petitioner, as aforesaid, would amount in the aggregate to about one hundred and fifty thousand dollars of the legal coined money of the United States of America.

All which said profits became due to your petitioner, and said W. T. R. company was justly indebted to and bound to pay him said sum on the day and date of the said forcible, illegal and malicious breach of said contract, and by reason of said breach; but, well knowing such liability and indebtedness, said W. T. R. company has wholly failed and refused to pay the same or any part thereof, though often thereunto requested.

Your petitioner further avers and charges that at the time and place hereinbefore specified he entered into a written contract, with specifications, which contract was substantially as the copy hereto attached, marked "A," and for the terms, specifications and considerations of the same reference is made to the preceding part of this petition and said copy; and further, that your petitioner in good faith entered into said contract with the said W. T. R. company, and on or about September, 1869, he expended large sums of money in procuring a commissary and working outfit with which to carry on and fulfill said contract; that he faithfully performed and discharged all his agreements and promises in said contract, and was able, competent and prepared to carry out said contract to comple-

tion, and was at all times ready and willing to accede to any reasonable request of the said W. T. R. company about said work on its said road under said contract, and your petitioner had no notice of dissatisfaction on the part of said W. T. R. company.

Your petitioner avers and charges that on or about the 2d day of April, 1870, Jno. T. Flint, acting as president of said W. T. R. C. and in such official capacity, did maliciously, fraudulently,
9 and oppressively, with the intent and purpose to wrong, injure, and defraud your petitioner, publish or cause to be published in the public newspapers of the state of Texas having a circulation in Galveston, Houston, and the country on the line of the road of the said W. T. R. C., which, under said contract, your petitioner had contracted to construct, a notice or advertisement, a copy of which is hereto attached, marked "E," declaring said contract null and void, and notifying the world that your petitioner had abandoned his said contract, which said publication was false, and said president had no authority to give such notice, because false and not provided for in said contract; that said publication had the effect to break up contracts your petitioner had made for labor, and caused great dissatisfaction among the workmen, his employees, then on the line of the road; and as your petitioner was temporarily absent from said line of road at the time, attending upon his sick wife, they believed said publication to be true and quit their work and contracts, and disorganized his operations under said contract. All which acts and doings of said Jno. T. Flint, as such president, said W. T. R. company afterwards fully ratified.

Amendment.—Filed Dec. 1st, 1877.

And further, at and about the said date the said W. T. R. company, through its officers and employees, combined and confederated with one John Byrns, and instigated the said Byrns, by promise of future rewards, to falsely set up a claim against your petitioner for labor and money advanced to your petitioner, and caused the said Byrns to sue out of the district court of Falls county, Texas, a writ of attachment for said amount so falsely and fraudulently claimed by said Byrns, and in the absence as aforesaid of your petitioner had the same levied by the sheriff of said Falls county upon a part of your petitioner's commissary and working outfit, intending thereby to cripple, harass, and damage your petitioner and to furnish a seeming excuse for violating said contract by the said W. T. R. company.

Your petitioner avers that he owed Byrns nothing, and that Byrns had no just cause of action against him; and that afterwards said W. T. R. company did reward said Byrns, and that the said W. T. R. company afterwards ratified all the said acts of John T. Flint, its president, and the said acts of its officers and employees in the Byrns attachment.

And further, that on or about the 1st of April, 1870, John T. Flint, who was then president of the said W. T. R. company,

and acting in his official capacity, did maliciously, forcibly, and oppressively enter and take possession of the entire line of said W. T. R. company from Bremond to Waco as aforesaid, and did then and there forcibly, maliciously, and oppressively eject, dispossess, and evict your petitioner from the premises, surveys and lines as specified in said contract, and as such president took forcible and illegal possession of said work, upon which your petitioner had a large force of hands at work under his said contract, and notified all persons that said W. T. R. C had declared said contract null and void, and ordered all laborers and sub-contractors under your petitioner to look to said W. T. R. C. for their pay in future; all which said acts were afterwards ratified by said W. T. R. C.

Your petitioner avers that by said fraudulent, forcible, malicious, and oppressive acts of said W. T. R. company that he has been greatly damaged, defrauded, and wronged in this:

The said W. T. R. company owe him a large sum of money for work and labor done and performed at the request of said W. T. R. company; and said W. T. R. company fraudulently hold and refuse to pay your petitioner a large sum of money retained by said W. T. R. company as reserved per cent., according to the terms of said contract, both which sums amount in the aggregate to twenty thousand dollars, due and owing your petitioner by said W. T. R. company, and which it refuses to pay him; and he has been further damaged by being fraudulently and oppressively prevented from completing his said work, and fulfilling the terms of his said contract, which he was amply able to do; and has been defrauded of all the profits, benefits, and advantages arising from said construction, as particularly hereinbefore enumerated, in the operating said road for the public for freight and passage as specified in said contract; in the profits of constructing the bridge across the Brazos river for said W. T. R. company, as specified in said contract; and that by said fraudulent, forcible, and oppressive acts of said W. T. R. company your petitioner has been damaged in his character, reputation, and standing among business men, because said acts have been done publicly through the newspapers and otherwise, and were known at Galveston, Houston, Calvert, and Waco, among both friends and strangers; and now your petitioner is forced to the harrassing and expensive recourse of a lawsuit to recover his just compensation; and that your petitioner has been put to great expense in trying to arrange a proper settlement with said W. T. R. company; and finally has been forced to expend large sums for attorneys' fees and cost in litigation, and will be obliged to expend more to the same end, all caused by the fraudulent, illegal, and oppressive acts of the said W. T. R. company.

All which sums for amount due and unpaid your petitioner for work done, money retained, and his said several damages amount to the further sum of one hundred and fifty thousand dollars in the coined money of the United States.

Your petitioner further shows and charges that it was understood and agreed by said W. T. R. C., and so specified in said contract that all sums of money due from said W. T. R. company to your
11 petitioner should constitute a lien and mortgage upon all the road-bed, superstructure, lands, franchises, taxes, and property of said W. T. R. company until paid, and it was agreed to execute notes and mortgages for the same, but said W. T. R. company has failed and refused to execute said notes and mortgages. It was further understood and agreed, as a part of the terms of said contract, that if said W. T. R. company violated the said contract, and should prevent your petitioner from carrying out the same, that then all damages, losses, and injuries should become as well an incumbrance and lien upon the road, road-bed, etc., as aforesaid, to the postponement of all other liens and mortgages upon said road, land, etc., of the said W. T. R. company, and your petitioner avers that said sums of money are due and unpaid from said W. T. R. company, and that the said W. T. R. company has grossly, fraudulently, and oppressively violated the letter, spirit, and intent of said contract, and has illegally and maliciously prevented your petitioner from carrying out and completing the same; therefore, all said sums of money and all such damages, injuries, and losses of your petitioner constitute a lien and incumbrance upon said road, road-bed, lands, etc., of the said W. T. R. company until discharged and liquidated.

John T. Flint is president and D. T. Chamberlin secretary and treasurer of said W. T. R. company, and its principal office at Waco, McLennan county, Texas.

Your petitioner is informed and believes, and so charges, that the legislature of the state of Texas, now in session, has or will change the name and style of the said W. T. R. company, and otherwise amend its charter.

Your petitioner prays for citation in the terms of the law to the said W. T. R. company, and that on final hearing hereof he may have his judgment against said W. T. R. company for his said sum of money due and unpaid, all his said claims, demands, damages, profits, and losses as aforesaid, together with his interests and costs; that said contract be, and all sums for work and labor performed and unpaid your petitioner, all sums of money retained by said W. T. R. company and due your petitioner, as well, adjudged a lien and incumbrance upon the road, road-bed, property, etc., of said W. T. R. company, as, also, all your petitioner's damages, profits, and losses, as aforesaid, whether held under the name of the Waco Tap Railroad or any other, or by any grant, gift, or right whatsoever, and that your petitioner have his decree for foreclosure; if not entitled to that, then that he may have his execution, and for such other and further orders and relief as he may be entitled to in law or equity.

12 *Amendment.*—Filed Dec. 1st, 1879.

Said W. T. R. company is notified to produce on the trial hereof the originals of the exhibits to this original petition, or evidence of their contents will be introduced.

Amended Petition.—Filed April 22d, 1876, making H. & T. C. R. company defendant.

Amendment.—Filed Dec. 28th, 1877.

Your petitioner avers that after the breach of his contract with the W. T. R. company, it procured the passage of an act of the legislature of the state of Texas changing its name from "The Waco Tap Railroad company" to "Waco and Northwestern Railroad company," and otherwise materially changing its charter. Said act approved August 6th, 1870, and the defendant heretofore designated as W. T. R. company, will herein hereafter be designated by the letters W. & N. R. company.

That immediately after the breach of his contract, as heretofore set up, said W. & N. R. company took possession of the entire line of said road from Bremond, in Robertson county, to Waco, McLennan county, Texas, and at once assumed and exercised complete control of the entire said line, to the great loss and damage of your petitioner, as hereinbefore set out.

And said W. & N. R. company so continued to possess and control the same until on or about the month of June, 1871, when said W. & N. R. company combined, confederated and agreed with the Houston and Texas Central Railway company, which is another corporation created by an act of the legislature of the state of Texas, by an act entitled "An act to establish the Galveston and Red River Railway company," approved March 11th, 1848, and the several acts supplemental thereto and amendatory thereof, having its principal office and place of business in the city of Houston and state of Texas and county of Harris, of which Wm. E. Dodge is president, and a non-resident of the state of Texas, and F. A. Rice is treasurer, and A. S. Richardson is secretary, the two latter residents of Harris county, Texas; and the Houston and Texas Central Railway company, which will herein hereafter be designated by the letters H. & T. C. R. company, had at said date full and complete notice of all your petitioner's rights under his said contract with the W. & N. R. company, as hereinbefore set up and pleaded, and with full notice of the filing of your petitioner's original petition in this cause, to wit, July 16, 1870, to hinder, delay and defraud your petitioner in the collection and recovery of his losses, profits and damages
13 as hereinbefore set out from the said W. & N. R. company, and to fraudulently transfer and dispose of all the rights, franchise, and property of said W. & N. R. company to the said H. & T. C. R. company, and the said H. & T. C. R. company, on its part and for its exclusive use and benefit, determined to absorb, appro-

priate, and fraudulently convert all the said property, rights, and franchise, and in fact the entire corpus and existence of the said W. & N. R. company, into itself, regardless of law, equity, or the rights of stockholders, creditors, or your petitioner.

And in pursuance of this fraudulent combination and determination on the part of said H. & T. C. R. company, they entered into a contract in writing, of date about July, 1871, in which it was stipulated that said H. & T. C. R. company was to grade, complete, and furnish said road of said W. & N. R. company from Bremond to Waco, Texas.

Among other things, it was provided in said contract, the H. & T. C. R. company obligated itself to complete and furnish said road of said W. & N. R. company to Waco by the first of Oct., 1872, and in consideration of such completion the W. & N. R. company executed its bond for $600,000.00 to the said H. & T. C. R. company, payable on the 1st day of January, 1873, and secured the payment of said bond by a deed in trust on its said road, road-bed, property, etc., of the said W. & N. R. company, and the said W. & N. R. company bound itself not to issue any more or additional shares of its capital stock, and that in default of the payment of the said bond for $600,000.00 said deed in trust was to be immediately foreclosed by the trustees, P. W. Gray and B. A. Botts, at the city of Houston, Texas.

That on or about October, 1871, the said W. & N. R. company and said H. & T. C. R. company made and entered into a supplemental contract in writing, which, among other things, provided that said W. & N. R. company should issue to the said H. & T. C. R. company, for its own use and benefit, two thousand shares of the capital stock of said W. & N. R. company of the value of one hundred thousand dollars; that said W. & N. R. company assign and deliver to the said H. & T. C. R. company, to its own use and benefit, the bonds of the city of Waco, in McLennan county, Texas, to the amount of one hundred thousand dollars; the said bonds having been taken by said W. & N. R. company from said city of Waco as the consideration paid by said city for two thousand shares of the capital stock of said W. & N. R. company; and to assign and transfer to said H. & T. C. R. company, for its own use and benefit, all the notes, accounts, claims for taxes, and all other demands whatsoever, the assets of said W. & N. R. company then held by it, and also to render an account of all its liabilities to said H. & T. C. R. company.

That at the time of making the said first or original contract, the said W. & N. R. company, through its officers and employees,
11 promised and agreed with said H. & T. C. R. company to procure the transfer and assignment, by the individual holders thereof, of a sufficient number of shares of the capital stock of said W. & N. R. company to said H. & T. C. R. company so as to give the said Houston & T. C. R. company a majority of said capital stock, and thereby insure the said H. & T. C. R. company the control of the directory of said W. & N. R. company; but said W. & N. R.

company failed to obtain the requisite number of shares already issued to said H. & T. C. R. company by said W. & N. R. company to give the control as aforesaid; then said W. & N. R. company, through its officers and employees, aided and assisted the said H. & T. C. R. company to procure from said city of Waco its shares of capital stock in said W. & N. R. company.

Amendment.—Filed January 12th, 1878.

Afterwards, to wit, on or about the 20th day of October, 1871, the said city of Waco did by its agreement in writing conditionally assign and transfer its said shares of capital stock, which amounted to two thousand shares, of the face value of one hundred thousand dollars, to said H. & T. C. R. company, and afterwards said transfer became absolute; at the time of entering into said conditional contract, B. F. Harris was mayor of said city of Waco, and D. S. Wallace was secretary of the common council, and both said officers signed said contract on the part of said city of Waco, and A. Groesbeeck as vice-president and A. S. Richardson as secretary for said H. & T. C. R. company, and sealed with the respective seals of said city and said H. & T. C. R. company.

Your petitioner avers that said transfer of said stock of the city of Waco, through the assistance of the said W. & N. R. company, was in pursuance of the original confederacy and combination, and done to give said H. & T. C. R. company absolute control of the directory of said W. & N. R. company, and thereby that end was accomplished, and of the largest stockholders of the said W. & N. R. company gotten rid of.

And that thereafter, on or about the 4th of November, 1872, the said H. & T. C. R. company, by means of its shares of the capital stock of said W. & N. R. company, so obtained through said supplemental contract, by the transfer of the shares of individuals, and the shares so obtained from said city of Waco, which gave said H. & T. C. R. company a large majority of said stock, did elect a majority of its own directors to be directors of the said W. & N. R. company, and thenceforth assumed and exercised, by its directors so elected, full, complete, and absolute control of the affairs and management of said W. & N. R. company.

15 The road of the said W. & N. R. co. was completed, equipped and running to Waco on or about 1872, but in the possession of the said H. & T. C. R. co., through said contracts, and said H. & T. C. R. co. continued to keep and hold possession of said road illegally and fraudulently as aforesaid, and continued to use, control and manage said road of said W. & N. R. co., receiving and appropriating all the revenues and profits of the same.

And further, in pursuance of its original nefarious design, the H. & T. C. R. co., by means of its control of the directory of said W. & N. R. co., wilfully and maliciously prevented any effort on the part of said W. & N. R. co. to pay the said six hundred thousand

dollars, or any part of it, or to relieve it in any way, or to prevent the default under said deed in trust. And no steps were taken or effort made by the said W. & N. R. co. to pay off or release said lien under said deed in trust.

That on or about the first Tuesday in February, 1873, P. W. Gray and B. A. Botts, trustees, sold the property described in said deed in trust, and the H. & T. C. R. co., through W. J. Hutchins, its vice-president, and acting president, became the purchaser at the sum of four hundred thousand dollars, said property being at that time well worth one and one-half millions dollars; and the trustees executed their deed of conveyance to the H. & T. C. R. co. therefor.

Your petitioner avers and charges that all the above recited acts and doings of the said W. & N. R. co. and H. & T. C. R. co., in and about said contracts; the assignment of stock in said W. & N. R. co. by itself, by individual owners and by the city of Waco; the election of directors from the directors of said H. & T. C. R. co., said sale and purchase, were illegal, fraudulent and void; because both companies are and were corporations chartered by the legislature of the state of Texas for specific purposes, and neither had the power or authority to so contract as aforesaid; because said acts are against public policy; because at the date of said pretended transfer of the property of the said W. & N. R. co. there could be no legal sale and purchase, as there was in fact but one party to it at the time, and that, the said H. & T. C. R. co.; because of the gross inadequacy of price pretended to be paid; because there was no necessity for said sale, it having been brought about by said H. & T. C. R. co. for the purpose of absorbing said W. & N. R. co.; because all said acts were conceived and executed for the purpose of defrauding and injuring your petitioner, and they did damage and injure your petitioner as aforesaid, and of whose right and demands against said W. & N. R. co. the said H. & T. C. R. co. had full notice.

16 That after said fraudulent sale on or about the 2d day of May, 1873, the said H. & T. C. R. company, by false statements and deceitful representations, procured the passage of an act of the legislature of the state of Texas by which, so far as the legislature could lawfully effect it, the said W. & N. R. company was merged into the said H. & T. C. R. company, and thereafter constituted a part of the same, there being no provision made in said act of merger for the debts of said W. & N. R. company.

That after said act of merger, on or about the 24th day of June, 1874, the said H. & T. C. R. company ordered a meeting of what was called the directors of the said W. & N. R. company, and after the persons calling themselves directors were assembled at Waco aforesaid, a majority of whom were directors of the said H. & T. C. R. company, they granted and conveyed to the said H. & T. C. R. company all the lands and land certificates to which the said W. & N. R. company was entitled as a donation from the state of Texas, amounting in the aggregate to five hundred thousand acres of land, which the said H. & T. C. R. company afterwards located on the unappro-

priated domains of the state of Texas, in what is known as Hardeman, Childress, Cottle, Kent, Tom Green, Howard, Mitchell, and other counties of the state of Texas, and well worth at that time one million of dollars, the consideration for which was pretended to be the two hundred thousand dollars claimed by the H. & T. C. R. company to be due it from the W. & N. R. company under said bond and deed in trust.

Your petitioner avers and charges that all the said acts of the pretended board of directors of said W. & N. R. company are illegal, fraudulent, and void, because they had no authority to act: because said transfer was not authorized by the stockholders of said W. & N. R. company called for that purpose; because said sale was in violation of the statute donating said lands to said W. & N. R. company; because if said pretended directors had any authority to act at all it was but to close up the affairs of said W. & N. R. company and distribute its remaining assets fairly among its creditors; because it was no sale, there being but one party to the transaction, to wit, the said H. & T. C. R. company; because of the gross inadequacy of price pretended to be paid by said H. & T. C. R. company; because it was in fraud of your petitioner's rights, and has injured and damaged him; because it was *ultra vires*, the said H. & T. C. R. company having no authority to acquire lands beyond its needs for use as a railway, depot grounds, etc., from any source except the state.

Your petitioner avers that said act of merger does not and was not intended by the legislature to cure the gross frauds and illegal acts of the said W. & N. R. company and the said Houston & T. C. R. company, nor does it change, alter, or affect any of your
17 petitioner's rights or remedies, but simply constitutes the said H. & T. C. R. company the custodian of the rights, property and franchises of said W. & N. R. company, subject to your petitioner's rights and demands, and a party defendant to this suit.

Since the pretended sales and act of merger, the said H. & T. C. R. company has become insolvent, and a simple judgment against it now would be comparatively worthless, as being subsequent to about twenty millions of indebtedness, which is a lien on all its real and personal property; that your petitioner was at said dates and is now the principal if not only legal creditor of the said W. & N. R. company, and at any of the said dates the property of said W. & N. R. company, which passed into the hands of the said H. & T. C. R. company, was worth at least one million dollars over and above its just debts and liabilities.

Your petitioner avers that all said acts and doings in and about said contracts, sale and purchase between said W. & N. R. company and said H. & T. C. R. company being illegal, fraudulent and *ultra vires*, therefore no title or right to the property of said W. & N. R. company passed to said H. & T. C. R. company thereby, and that the said H. & T. C. R. company acquires its right to hold and enjoy the rights and benefits of the property and franchise of said W. & N. R.

company through said act of merger as aforesaid only, and by no other right or authority.

And by virtue of said merger and consolidation of said W. & N. R. company into said H. & T. C. R. company the latter is bound to pay your petitioner all his claims, demands and damages with interest thereon, and his proper costs in this behalf expended, as hereinbefore set up, the same as said W. & N. R. company was bound and liable before said merger.

And said H. & T. C. R. company now holds and enjoys the property and franchise of said W. & N. R. company, subject to and burthened with this suit of your petitioner. And that said property of the W. & N. R. company in the hands of said H. & T. C. R. company, of whatever kind or nature, is the fund to which your petitioner is entitled to look primarily for his said debt, demands and damages, and that said property is so liable primarily to him as aforesaid.

That said H. & T. C. R. company has received from first to last from said W. & N. R. company in its lands, road-bed, etc., Waco city bonds, capital stock of said W. & N. R. company, tax lists, sub-criptions, and other property to the value of about three millions of dollars; that is to say, the said H. & T. C. R. company, through said sale and transfer, acquired the road, road-bed, franchise, etc., of the W. & N. R. company, of the value of one and one-half million dollars; five hundred thousand acres of land, situated as aforesaid, the donation of the state to said W. & N. R. company, of the value of one million dollars; Waco city bonds, of the value of one hundred thousand dollars; capital stock of
18 said W. & N. R. company, issued by it to H. & T. C. R. company, of the value of one hundred thousand dollars; 150 acres of land at Bremond, in Robertson county; sixty-two acres of land at Marlin, in Falls county; twenty acres of land at Waco, McLennan county, which, with the tax lists, subscription list, and other property of the W. & N. R. company, was of the value of three hundred thousand dollars, the consideration for all which was pretended to be the original six hundred thousand dollars agreed to be paid by said W. & N. R. company to said H. & T. C. R. company as aforesaid.

Amended Petition.—Filed Jan'y 12, 1877, amending amendments of April 22, 1876, and December 28, 1877.

Your petitioner gives notice to said W. & N. R. company and H. & T. C. R. company to produce on the trial hereof the two contracts as herein described, the deed of conveyance by Gray and Botts, trustee, and said deed in trust executed by said W. & N. R. company to Gray and Botts; the transfer of the lands of the W. & N. R. company, all the records, books, papers, and minutes of said W. & N. R. company, including the engineer's estimates; books, letter book of the secretary and treasurer of said W. & N. R. Co.; so much of the records of said H. & T. C. R. company as pertain to the W.

T. R. company or W. & N. R. company; a list of directors and officers of said H. & T. C. R. company for the years 1871-'2-'3-'4-'5-'6; the contract between said H. & T. C. R. company and the city of Waco, as specified herein.

Your petitioner asks, in addition to his prayer hereinbefore, that said H. & T. C. R. company be made a party hereto and cited in terms of law, and that he have his judgment against said H. & T. C. R. company for his said debt, losses, profits, and damages, as hereinbefore alleged, together with lawful interest on the same from April 2d, 1870, and his costs in American coined gold.

And that all the property formerly belonging to said W. & N. R. company or W. T. R. company be adjudged primarily liable for his said judgment in the hands of said H. & T. C. R. company, and that the sheriff of McLennan county, or other proper person, be ordered and empowered by order of your honor to seize and sell the same to satisfy said judgment under such orders and directions as your honor may deem proper, and if the same is not sufficient to satisfy said judgment, then that he have his execution for the remainder.

But if said property is not so liable, then that he have his judgment and execution against said H. & T. C. R. company as first asked.

And for such other fuller and further orders and decrees as your petitioner may be entitled to in law or equity, and will ever pray, etc.

E. A. McKENNEY
and THOS. HARRISON.

19 "A."

Contract.—The Waco Tap Railroad Company.

Articles of agreement made and entered into this the 19th day of July, A. D. 1869, between Thomas M. Shirley, of the city of Houston, of the one part, and the Waco Tap Railroad Company of the other part, whereby it is covenanted and agreed as follows, viz:

1st. That the said Thomas M. Shirley, contractor, does hereby covenant and agree to form, prepare, finish and execute, in a thorough and workmanlike manner, the clearing, grubbing, excavation, embankment, trestling, surfacing, track-laying, and to furnish the cross-ties of the said road entire, from the junction of the Houston and Texas Central Railway Company to the town of Waco.

2d. The execution of this contract shall conform in all respects to such specifiations, and to such plans or profile, or to such notes of surveys and levels as may from time to time be furnished by the engineer of said corporation. But the same shall be regulated and controlled nevertheless by the specifications so far as they relate to this contract, and marked "A," which is hereby made a part and parcel of this contract; and whatever additions or alterations in the

line, levels, plans or specifications the engineer may consider expedient during the progress of the work shall be made upon the same terms, and according to the same rate of prices as other similar kinds of work under this contract.

3d. The work under this contract shall be commenced on or before the first day of September, A. D. 1869, and shall be made and completed on or before the 1st day of September, A. D. 1871; and for a failure to make and complete the same within the time fixed for its completion, the engineer for the time being may assess such damages as may be just and equitable, and charge the said contractor with the amount thereof; and the engineer may, after giving thirty days' written notice to the contractor to increase his force so as to hasten the completion of said contract, and his failing to do so, employ other assistance as in his opinion may be necessary to the completion of the work within the specified time, and the expense of such assistance shall be paid by the contractor. But if the execution of any part of the work be delayed by any act or failure on the part of the before mentioned corporation, the contractor shall, at the time of such hindrance, give notice thereof in writing to the engineer, and, with respect to the portion of the work thus delayed, shall upon such notice become entitled to an extension of the time of completion named in this contract equivalent to the time of such delay.

4th. The contractor shall not transfer this contract without the consent of the president of the company. In all sub-contracts made by the contractor the work shall be considered as under his immediate charge, and he shall at all times manage the same as though no sub-contract existed. The contractor shall, upon application of the engineer for the time being, discharge any workman or laborer from his employment, and he shall not employ any workman or laborer who has been discharged for improper or disorderly conduct. The contractor will co-operate in the maintenance of such system of police, and will conform to such regulations as in the opinion of the engineer for the time being shall conduce to the regular and peaceable progress of all parts of the work, and tend to prevent all unnecessary interference with the rights, privileges, and property of the persons in the vicinity of the railroad.

5th. On condition of the fulfillment by the said contractor of the foregoing provisions of this contract the said "Waco Tap Railroad company" doth hereby promise and agree that the said corporation shall and will, for doing and performing the work as aforesaid, pay, or cause to be paid, to said Thomas M. Shirley, the said contractor, or to his heirs, assignees, executors, or administrators, at the rate of twenty-five cents per cubic yard for excavations and embankment in common earth or clay; for "hard pan," or such other material not herein specified, as cannot be removed in greater quantities than six cubic yards per day by an experienced, first-class railroad laborer, forty cents per cubic yard; excavation in loose rock, seventy-five cents per cubic yard; excavation in solid rock, one dollar and

ten cents per cubic yard; grubbing, per chain of one hundred feet, five dollars; clearing, two hundred feet wide, three hundred and fifty dollars per mile; cross-ties, forty-five cents each; trestling, six dollars and fifty cents per lineal foot; surfacing, one hundred and fifty dollars per mile; laying track, five hundred and fifty dollars per mile. Compensation for the above labor all to be paid in American coin at the office of the company.

6th. The engineer for the time being shall decide on the quantity and quality of the work done in accordance with the specifications attached hereto.

7th. Monthly estimates during the progress of the work will be made by the engineer of work done to his acceptance, to such amount as shall in his judgment be a fair average value of the same agreeably to this contract, and for the amount so estimated the contractor will be paid eighty-five per cent.; and when the whole work hereby contracted for shall have
21 been accepted by the engineer, as completely agreeably to this contract, the balance shall forthwith be paid to the said Thomas M. Shirley, his heirs, executors, assignees or administrators. And the company will secure to the said contractor the payment of the said fifteen per cent., as well as any other sum that may be due and unpaid, by mortgage on their road-bed and superstructure and rolling stock, lands, franchises and other property; the said mortgage to be duly executed as soon as the reserved fifteen per cent on the work done shall amount to the sum of twenty thousand dollars, together with any other sum or sums that shall have accrued and be due, which mortgage shall be payable on the final completion of the entire work. At the end of each and every month the company shall give their note, bearing ten per cent. interest, for whatever sum may be due upon the monthly estimate, and also the reserved percentage to be secured as above specified. The company shall also execute their notes, with ten per cent. interest from date of purchase, for all iron, rolling stock or other material or property that the contractor may purchase by approval of the president of the company, which notes shall in like manner be secured by mortgage as above specified. As the entire work specified in this contract is not required to be done before the expiration of twenty-four months, it is hereby expressly understood and agreed that said company is not compelled to pay said contractor on any monthly estimate more than eighty-five per cent. of one twenty-fourth part of the entire work to be done; provided, however, that if the said Shirley shall complete more than the twenty-fourth part of the whole contract in one month, then the said company shall pay the full amount of each such monthly estimates, less the fifteen per cent. reserved, if in funds. And it is also agreed between the above contracting parties that should the work on any portion of it executed under this contract not be of such quality as is herein stipulated to be made, that is to say, that if the work or any portion of it, in the opinion of the engineer, be constructed in an inferior manner, then and in such case the monthly

or final payment above provided for may be withheld until such time as the engineer shall decide that the spirit of this contract has been complied with. Or, instead thereof, the engineer may make such deductions from the price herein stipulated to be paid as may be fair and right; provided, however, that the engineer shall notify the contractor during the progress of the work, stating plainly and explicitly wherein the work being done does not conform to the contract and specifications, and after the work shall have been completed without notice it shall not be complained of by the engineer.

22 8th. And it is further agreed to between the parties hereto, that in case the said contractor shall refuse or neglect to perform all the contracts hereinbefore enumerated, or shall violate the spirit thereof, upon the engineer certifying such neglect, refusal or violation to the president of said company, the president may at his option, after careful investigation and due notice in writing to the contractor, and his refusal to remedy the evils complained of, declare this contract null and void; and in that case whatever balance may be due or unpaid for work done shall be forfeited to the use of said company, or such part thereof as may be equitable and just. And the said president may proceed to re-let or dispose of the work remaining to be done as if this agreement had never been made.

9th. And it is further agreed between the contracting parties that the iron shall be laid and the road finished complete as fast as sections of ten miles can be prepared for the rails, and the company obligate themselves to provide iron and an engine and necessary cars to haul the supplies of the contractor, and distribute the iron, ties, etc., as the work progresses; and the contractor shall have the privilege of operating the road, and be entitled to all the profits arising therefrom as finished, until all claims are fully paid off and discharged by the company. A final estimate is to be made and the grading accepted by the company as fast as completed in sections of three miles. It is further agreed that the contractor shall have the right to construct the bridge for the railroad over the Brazos river, according to such plans and specifications, and upon such terms as may hereafter be agreed on between the said contractor and the president of the company; and such agreement so to build said bridge shall when so made be considered a part and parcel of this contract. The contractor shall contemporaneously with the signing of the contract enter into a bond or obligation with the said company, to be considered a part of this instrument, with surety to be approved by the president of the company, for the faithful compliance with and fulfillment of the contract.

10th. Should the work be suspended by the said company for six months, or this contract be plainly violated on their part, then in such case the contract shall be null and void at the option of the contractor, and all sums due the contractor, as well as the reserved percentage retained, shall become due and the mortgage shall be foreclosed; and it is further agreed that the mortgage shall be so

drawn that in the event of such contingencies it may be foreclosed without delay, or involving the contractor in litigation. It is further considered a part of this contaact that the president and directors shall do all in their power to aid the contractor in obtaining labor,
23 supplies, timber, etc., and to lend their cordial support and influence to facilitate the contractor in every way in the prosecution of the work.

11th. When the said company shall have paid or secured to the satisfaction of the contractor for the work herein specified the sum of one hundred and fifty thousand dollars, then the said contractor hereby obligates himself to advance towards the said work the sum of twenty-five thousand dollars ($25,000.00) in work; and when the said company shall have paid to or secured as aforesaid the further sum of fifty thousand dollars ($50,000.00), then the said contractor hereby binds himself to advance the further sum of twenty-five thousand dollars in work ($25,000.00); and when the said company shall have paid or secured to the satisfaction of the contractor within one hundred thousand dollars ($100,000.00) of whatever sum that may be requisite to complete the road, the contractor hereby obligates himself to complete the entire work herein contemplated and specified in this contract; provided, that mortgages shall be executed by the company to the said contractor for the advancements made on money so expended by him as hereinbefore provided in this contract. All sums of money to be paid on notes to be given as specified in this contract shall and are to be paid in American coin.

12th. In case of default or failure on the part of the said contractor he binds himself to account and pay and be liable to said company at its office in the city of Waco for all loss, injury and damage by it thereby sustained.

In testimony of all which the said contracting parties have signed their names and affixed their seals (using scrolls for seals), at Galveston, Texas, the day and date first above written. The Waco Tap Railroad company signed by their president, subject, however, to the approval of the board of directors of said company.

[SEAL.] THE WACO TAP RAILROAD COMPANY,
By J. W. SPEIGHT, *President.*

[SEAL.] THOMAS M. SHIRLEY.

Countersigned by the directors: J. E. Harrison, E. C. Stewart, Thos. P. Aycock, Wm. A. Fort, Jno. T. Flint, E. A. Sturgis, Rich'd Coke.

24 "B."

CALVERT, *March* 23d, 1870.

T. M. SHIRLEY, esq'r, Houston, Texas.

DEAR SIR: It is with regret that I am obliged to call your attention to the enclosed copy of a resolution passed by our directors on the 18th inst. The condition your work is now in, and your total

failure to carry out the contract according to its intent and spirit, amounts to a failure on your part. You are hereby required to comply strictly with the requirements contained in the enclosed resolution. (Except that you be allowed twenty-five days from the receipt of this notice, which will make thirty-two days from the date of its passage, to carry out the demands there made.)

I am further instructed to inform you that no estimates will be paid you till your work is in a more satisfactory condition.

You will please acknowledge the receipt of this notice by telegraph to me at Marlin. Respectfully,

E. L. HERRIOT,
Ch. engineer.

"C."—*Resolution.*

WACO, *March* 18th, 1870.

"*Resolved*, That the engineer serve a notice on the contractor to put one hundred working hands upon the work within fifteen days from this time, and that he keep that many hands constantly employed; and that a default in these requirements will be treated as a violation of the contract, and the president and engineer are requested to hold the said contractor to a rigid performance of the contract."

E. L. HERRIOT, engineer Waco Tap R. R. Co.:

I above transmit you a copy of a resolution of the board of directors, passed this day, for your observance.

Yours truly,

JNO. T. FLINT,
Pres. Waco T. R. R. Co.

25 "D."—*Telegram.*

WACO, 2 *Ap'l.*

To THOMAS M. SHIRLEY.

I have declared your contract null and void, and will not recognize you any longer as a contractor on the Waco Tap Railroad.

JOHN T. FLINT,
Pres. W. T. R. R. Co.

"E."—*Advertisement in the Newspapers.*

Waco Tap Railroad.

Contractors and hands wanted.—Thomas M. Shirley having virtually abandoned the work on the Waco Tap Railroad and violated in other respects the spirit of his contract, the same is declared null and void this day, and the said Shirley will no longer be recognized as a contractor thereon. Contracts for section work, general work, and for ties and bridging are solicited, and general laborers wanted. Good prices will be paid.

JOHN T. FLINT,
President Waco Tap Railroad Co.

Waco, April 2, 1870.

Consolidated and Amended Original Answer.—Filed June 6th, 1878.

Suit pending in the district court of McLennan county, Texas.—November term, A. D. 1878.

T. M. Shirley
vs.
Waco Tap Railroad Company. } No. 1779.

Now comes defendant, Waco Tap Railroad company, and, leave of the court had, now consolidates and amends its pleadings heretofore filed, to wit: Original plea and answer, filed Nov. 25, 1870; amended answer, filed April 23d, 1874; and amended answer, filed April 24th, 1874, and says:

26

First. The allegations and averments in said plaintiff's petition and various amended petitions made and set out are insufficient in law to entitle him to have and maintain his said action, and of this the judgment of the court is prayed.

Second. Said defendant denies all and singular the averments, allegations, and representations in said original and various amended petitions filed herein by plaintiff, and consolidated in his petition or pleading filed in this cause June 7th, 1878.

Third. And specially answering in this behalf, the defendant says that the contract set out and declared on in said plaintiff's petition is now and was from the beginning absolutely null and void, and such as no court of law or equity should countenance or enforce in this, that the same was procured, and this defendant was induced to execute and enter into the same by the false, fraudulent, covenous, and iniquitous representations and conduct of said plaintiff, Thos. M. Shirley, and the sureties on his bond, to wit, Massey and Sessums, who, it is averred, were the parties principally interested in said contract, and merely used plaintiff as their agent and for their advantage and benefit in the negotiation and execution thereof.

Defendant avers that plaintiff represented to its officers and directors that he was a skillful, experienced, and successful railroad contractor and builder, and that he was able and competent, with money and all necessary means and appliances of his own, and to be furnished by said Massey and Sessums as occasion required, to begin, carry on, and complete the work specified and defined in said contract according to its terms, and represented to this defendant that said Massey and Sessums were immensely wealthy and controlled and had unlimited credit, and that they would advance and furnish him (Shirley) all the supplies and money necessary to enable him fully and in all things to begin, carry on uninterruptedly, and complete the work stipulated in said contract according to its terms; and that said Massey and Sessums were able and willing to furnish the money and means to build and equip the entire road from Bremond to Waco. This defendant avers that as a component part of said contract plaintiff agreed to execute and deliver a good and sufficient and solvent bond to this defendant in the sum of one hundred and

fifty thousand dollars as a security to this defendant for the proper performance of his part of said contract; and it is averred that said Shirley did execute and deliver a bond in said amount with
27 said Massey and Sessums as sureties, and that, relying on the representations aforesaid, this defendant did accept and approve the same, and, still relying on and confiding in said representations of said Shirley, that this defendant did enter into a contract with said Shirley substantially like the one attached to plaintiff's petition.

Defendant avers that this defendant was moved and induced solely by confidence in said reliance on the representations of said Shirley to enter into the said contract and accept said bond, and that said Massey and Sessums made repeatedly to the president and other officers of the Waco Tap Railroad company the same representations as those made by said Shirley, and as an inducement to said company to bring about the execution of said contract; that said Massey and Sessums reside and did then reside in the city of Galveston, Texas, a point remote from this, and apparently were doing a large cotton factorage and grocery business, and that this defendant could not obtain at the time of the execution of said contract, nor for a considerable time afterwards, any information of the falsity of the representations of said Shirley aforesaid. But this defendant avers and charges that at the time of making of said contract, and before, and while treaty for the same was pending, and when the representations of said Shirley as aforesaid were made, the said Massey and the said Sessums and the said Shirley were hopelessly bankrupt and insolvent, and unable to pay even a small per cent. on their debts, all of which was well known to said Shirley at the time, and was well known to the said Sessums and Massey at the time, and in a short time thereafter, to wit, one hundred days after the expiration of said contract, or thereabouts, the insolvency and utter inability of the said Massey and Sessums to pay but a very small per cent. on their just debts became public and notorious, and at the same time the fact became patent and public that said Massey and Sessums were at and before the making of said contract, and the representations aforesaid, utterly bankrupt and insolvent. Wherefore defendant says that the representations aforesaid, which alone induced this defendant to enter into said contract, were willfully and fradulently false, and defendant further says that by reason of the utter insolvency and bankruptcy of all the obligors in the aforesaid bond, all of which was well known to the said Shirley at the time of the execution of the same, and unknown to the president and directors of the Waco Tap Railroad company, and the fraud of said Shirley in inducing an acceptance and approval of the same, the said bond is and has always been a nullity, and said contract has been and is incomplete by reason of the failure of said Shirley to
28 give bond and security for its faithful performance on his part, as he was bound to.

Defendant avers that the frauds aforesaid have operated and are

now producing great injuries and damages to the interest of said railroad company; that large amounts of money and implements, and large commercial credit, on the part of said Shirley and his supporters and backers, were necessary to enable him, the said Shirley, to comply on his part with the said contract; that the insolvency and bankruptcy of said Shirley and his said supporters, Massey and Sessums, their utter destitution of money, means or commercial character and credit, has rendered such efforts at compliance as have been made by said Shirley abortive and unavailing, and has brought discredit and disgrace upon this defendant.

Defendant avers that said Shirley has utterly failed in every respect to comply with said contract, and this defendant here charges a distinct and unqualified breach of said contract by said Shirley in each and every part thereof, and an utter failure to do or perform any part or portion of the work specified and defined in said contract to be done. Defendant avers that by reason of the aforesaid frauds of the said Shirley the discredit and disgrace brought on the Waco Tap Railroad company in being identified with said insolvent and bankrupt parties, the delays in constructing said railroad by means of said null and abortive contract, and the expenses incurred by this defendant in preparing for work under said contract before its nullity became known, and by reason of twenty-five thousand dollars paid out to said Shirley by this defendant, which, it is averred, was so paid for work fraudulently represented by said Shirley to have been done on said road under said contract, but which in fact not so done, this defendant has been damaged in the sum of fifty thousand dollars, which is here pleaded in reconvention, and for which, being ready to verify all the allegations herein, he prays for judgment against said Shirley.

Defendant further prays that said contract be held and adjudged null and void, and that it be declared cancelled and of no effect.

And answering further in this behalf, if it shall be held that said contract has force and validity, this defendant says that said plaintiff should not have and maintain his action aforesaid, because it alleges that the defendant did in all things comply with the letter and spirit of said contract, and was still proceeding in full and strict compliance with the same in all its requirements when in the month of March, 1870, said plaintiff, Thomas M. Shirley, left the work on the line of the road in Falls county, Texas, failed and refused to pay his laborers and employees thereon, and failed and refused
29 to furnish them subsistence, and failed and refused to carry on the work under said contract. And he, the said Shirley, being in a hopelessly insolvent condition, all his property of every kind and description used in attempting to carry on the work on said road under said contract was seized and attached by officers of the law in virtue of legal process issued at the suit of his creditors, was left without tools or implements or other equipments with which to carry on said work; and he, the said Shirley, still remaining absent, it is averred, could not be found by the officers, or any of them, of

the Waco Tap Railroad company, and refusing to communicate with them, or either of them, when he was sought for by them; and it is further averred that said Shirley having repeatedly failed and refused to pay his laborers and employees on said work in said month of March, 1870, still refusing, all his said laborers and employees abandoned the work, and so having no laborers, no employees, or equipments on said road, having no work going on, and being then and having continuously for many months previous thereto been absent and inaccessible, with a full knowledge, as is averred to be the fact, that the work was abandoned, it is averred and charged that said Shirley, at the time aforesaid, did willfully abandon his said contract and release this defendant from further obligation to observe the same. Defendant avers that the Waco Tap Railroad company was and is a corporation dependent for its success in building said railroad on the confidence of the public in its ability to meet all just demands against it promptly and punctually, and that said company has fully paid to said plaintiff, Shirley, every dollar due him for work done under said contract; and always from the commencement of said work to the time of its abandonment by said Shirley, did pay him every dollar due him promptly and punctually, and for the most part paid him in advance before the same was due; yet defendant avers that said Shirley, with a twofold object—first, with the malicious intent to injure, defame, and disgrace the credit of said company; and, secondly, with the object of screening himself from the just indignation of his numerous unpaid creditors, who were pressing their demands upon him—did maliciously, slanderously, falsely, and fraudulently represent, publicly and privately, to his laborers and employees, and to his various clamoring creditors, to the great injury and damage of said company's credit and standing, that said company had failed and refused, and were not able to pay him (said Shirley) the money due for work done on said road under said contract; all this in the months of January, February, and March, in the year 1870, and in direct violation of the letter and spirit of said contract; all of which defendant is ready to verify.

30 And for further answer, defendant says that if the contract set up and declared on ever had any validity, which is not admitted, but denied, that the same was wholly abandoned and set at naught, and the defendant released from further observance of the same, by said Shirley, in the month of March, 1870, by the failure and inability of said Shirley to work under or perform the same or any part thereof; and by the total want and destitution on the part of said Shirley of any labor, or tools, or implements, or equipments, or of money or credit to procure the same or either of them, for carrying on work under said contract; and defendant avers that at said date the plaintiff, Shirley, and the sureties on his bond, Sessums and Massey, were wholly and notoriously bankrupt and insolvent, and utterly unable to respond in damages for the breach of said contract; and that if defendant had waited longer before taking possession of said road and declaring said contract abandoned and

forfeited, the damage to said company, its credit, standing, and prospects, would have been great and irreparable, and without any redress, except upon said insolvent and utterly worthless bond; all of which defendant is ready to verify.

And answering further, defendant says that by reason of the facts set out and alleged in the two pleas next preceding this, which are here referred to as a part of this plea, the said Shirley has in letter and spirit broken and violated the said contract, and in so doing has injured and damaged the credit and standing of said company; has retarded and delayed the building of said railroad; has caused said company to incur great expense with a view of carrying out said contract, which was otherwise unnecessary; has hampered and embarrassed said company in its financial operations, necessary to be consummated in order to the building said road, by his absurd claim for damages preferred in this suit, all to the damage of defendant twenty-five thousand dollars, which is here pleaded in reconvention, and for which judgment is prayed against said Shirley.

Fourth. This defendant further says that said plaintiff is not entitled to have and maintain his action herein for damages, because he had no skill or experience as a railroad contractor and builder. He was a mere adventurer in said business, and he was entirely destitute of money, means, and credit, save and except his dependence in this regard upon said Massey and Sessums. And when he ascertained that they were actually insolvent, or in a failing condition, on, to wit, about the 1st of February, 1870, he entirely abandoned the work on defendant's road, provided for in said contract, and ceased to give any personal supervision of said work on said road, and absented himself from the entire line of said road; and knowing his utter pecuniary inability, and the insolvency of said Sessums and
31 Massey, the slow progress and unsatisfactory condition said of work, and his incapacity for the lack of means and experience to perform said contract according to its legal tenor and effect; and wishing to make some pretext to absolve himself therefrom, and to charge this defendant with a breach thereof, he, the said plaintiff, not only abandoned said work and absented himself therefrom during said month of February and March thereafter, but left said work under the supervision of no one but some drunken and worthless and irresponsible men or sub-contractors; and the more effectually to compass said pretext and accomplish his design, and to avoid any notice on the part of this defendant under the terms of said contract, during said months of February and March, while so absent from said work, he purposely concealed himself, and purposely failed to answer repeated letters and telegrams sent to him during said months by the president and engineer of this defendant, in regard to the work on defendant's said road, which telegrams were sent to him at his place of residence in the city of Houston, Texas, by due course of telegraph; and said letters were mailed, postage prepaid, and directed to him at said place; and said engineer during said time hunted him up and expostulated with him in regard to his de-

sertion and neglect of the work on said road. But said plaintiff, fully intent upon the accomplishment of said design, and wickedly and fraudulently contriving and intending the consummation of said pretext, falsely represented to said engineer that the sickness of his wife in said city of Houston was the cause of his prolonged absence from the work on this defendant's road; when in truth and in fact, while said engineer was at his home in said city of Houston hunting him, he, the said plaintiff, was in the city of Galveston, distant therefrom fifty miles, and was there for the double purpose of avoiding an interview with said engineer, and of forcing this defendant, without an opportunity of complying with said contract by serving written notice upon him, to commit some breach thereof.

This defendant further says that time specified in said contract for the completion of its said railroad was of the very essence, reason, object, and spirit thereof; and this the said plaintiff well knew and understood at the time of the execution and delivery of said contract. Said plaintiff also well knew that this defendant had no money to pay for the construction of said road, and was solely dependent therefor upon subscriptions and donations of such citizens as were interested therein; and that such subscriptions and donations depended upon the confidence inspired by the progress of said work, and the prompt, reasonable, and equitable performance of said contract by plaintiff; and the said plaintiff well knew, which is now here charged as a fact, that from the time

32 he entered upon the performance of said contract he was personally, for the greater part of the time, absent from his camp on the line of this defendant's road, loitering about Bremond and Calvert, inattentive to and neglectful of all and singular his duties, undertakings, and covenants as specified in said contract, and guilty of all manner of delinquencies and excesses incompatible with the due and faithful performance thereof, and destructive of public confidence therein, upon which this defendant solely relied for the means to comply with its part of said contract; and said plaintiff also well knew, which is here now averred as a fact, that by the spirit, object, and legal import of said contract he was bound to execute and perform a reasonable amount of said work monthly on said road, approximating to about one twenty-fourth of the entire work, and that although eight months had elapsed from the date of said contract and the commencement of work thereunder by said plaintiff, and during said time he had been engaged on the lightest work on the entire line of said railroad, yet by his inattention, repeated and prolonged absence from the work, his inexperience and inefficiency as a railroad contractor and builder, the inadequacy of the force he had on the work, and his inability to pay his workmen their wages, and to comply with his contracts for supplies and necessaries for the subsistence of his hands, and the successful accomplishment of the work, he fell far short during said eight months of compliance with said spirit, object, and legal import of said contract; had no margin for profit during said time, but on the contrary suffered loss; impaired

confidence in the speedy completion of this defendant's road, as specified in said contract; and at the same rate of progress, as plaintiff well knew, his compliance with said contract within the time therein mentioned and peremptorily required was an absolute impossibility. Plaintiff also well knew that before entering into said contract, to wit, on the 1st day of June, A. D. 1868, in the district court of the eastern district of Texas, of the United States, at Galveston, on his own petition, and upon the faithful surrender of all his property, as by act of Congress required, for the benefit of his creditors, he had been adjudged a bankrupt, and that at the date of said contract he had no means or credit whatever, save the means and credit of said Massey and Sessums, which were at his command for their advantage and benefit in the execution and performance of said contract; and said plaintiff further knew, and the same is here now charged as a fact, that when said Massey and Sessums failed in business and became insolvent, which occurred in February or March, 1870, it was utterly impossible for him to raise the money and means necessary in order for him to perform his promises, under-
33 takings and covenants as he in said contract bound himself to do, and it was also impossible for him thereafter to give to this defendant a good and sufficient solvent bond as he agreed and bound himself to do. It is therefore charged, that with a knowledge of all these facts, and with the design and pretext aforesaid, with his work and defendant's said road in an unsatisfactory condition, and his hands or workmen clamoring for their wages, which plaintiff was unable to pay, he absented himself from and abandoned the work on defendant's said road, and continued absent therefrom as aforesaid; and during his said absence, to wit, on the 29th day of March, 1870, because of his said absence from and abandonment of the work on this defendant's said road, and because of his indebtedness to and non-payment of his sub-contractors and laborers on said road of this defendant, one John Byrns sued out an attachment from the district court of Falls county, state of Texas, and had all the outfit, tools, implements, and everything used on said work belonging to said plaintiff attached; and thereby the work on said road was suspended, confidence in the plaintiff of all his sub-contractors and employees impaired, if not destroyed; as also of his creditors for supplies, if any he then had, which is not admitted. Said Byrns was a sub-contractor on said work in the employ of said plaintiff, and brought said attachment suit against said plaintiff for money due him by said plaintiff for said work.

Fifth. It is averred that by reason of the facts hereinbefore stated, and particularly the inexperience and want of skill and management of plaintiff in railroad building, his utter insolvency, as also the insolvency of his bondmen and backers, the said Massey and Sessums, his inability to procure credit or means from any other source, the fact that money could not be borrowed in March and April, 1870, in Texas for less than from three to five per cent. per month, and then only upon undoubted and sufficient real estate or personal security,

neither of which plaintiff could give, that said contract could not be made the basis of sufficient credit in or out of Texas to have enabled plaintiff to have borrowed money enough to have progressed with completed the work on this defendant's said road according to the terms of said contract, because by the terms thereof this defendant was only to pay money for work done at its option and if in funds; the demoralization of plaintiff's sub-contractors and laborers because of his absence from the work and their non-payment, his lack of discipline and their want of confidence in him, and his general bad repute along the line of defendant's said road and elsewhere because of his pecuniary inability to meet his
34 debts contracted for labor and supplies on account of the work on said road, and his carelessness, mismanagement and profligate habits; on account and by reason of all these facts it is averred that compliance with said contract on the part of plaintiff at the time said contract was declared forfeited was an absolute and manifest impossibility, and if perchance by unforseen assistance and extraordinary efforts said plaintiff had been successful in the performance of said contract in the completion of said road on account of said obstacles and difficulties by which he was environed, and the innumerable contingencies that would have occasioned delay and loss, it is averred that no profits whatever would have been realized by him from such performance.

Sixth. This defendant specially denies all and singular the allegations of plaintiff contained in his amended petitions filed herein Dec. 1st, 1874, and Dec. 28th, 1877, charging fraudulent combination and conspiracy with John Byrns and with the Houston and Texas Railway company, and alleges that neither it nor any of its officers instigated, directly or indirectly, or had any connection, directly or indirectly, with the institution of the attachment suit of said Byrns against plaintiff. It is true that this defendant entered into a contract in writing of date about July, 1871, with said H. & T. C. R. R. company, in which it was stipulated that said H. & T. C. R. R. company was to grade, complete and furnish the road of this defendant from Bremond to Waco, Texas, by the first of October, 1872, and that in consideration of such completion this defendant executed its bond for $600,000 to said H. & T. C. R. R. company, payable on the 1st day of Jan'y, 1873, and secured the payment of said bond by a deed of trust on its said road, road-bed, property, etc., and that by default of this defendant and the due and legal execution of said deed in trust, according to its terms, all the rights, privileges, franchises, and property of this defendant passed to and lodged and vested in said H. & T. C. R. R. company, as by plaintiff alleged. But this defendant specially denies that there was any fraud in said transaction; they, or any of them, were made and entered into for the purpose of defrauding, hindering, or delaying any creditor of this defendant. And that so far as plaintiff is concerned he was a director in both the company of the said H. & T. C. R. R. company and in this defendant's company when said proceedings and trans-

actions were had, and had full knowledge thereof, and interposed no objection thereto in so far as this defendant is advised. It is also averred that the extremity of this defendant, as evidenced by said proceedings and transactions, and the inability of this defendant to pay said consideration of $600,000 for the completion of its said road, were the direct and necessary results of the conduct of plaintiff
35 towards this defendant, as hereinbefore shown; and it is further averred that all and singular the actings and doings of this defendant in regard to said contract with the said H. & T. C. railroad company—said bond for $600,000, said deed in trust to secure the payment of the same, and its execution, this defendant acted in the most perfect good faith. And while it is true that plaintiff then had a suit pending against this defendant for a fabulous amount of unliquidated demands, this defendant did not regard him as a creditor at all, because said suit had then been instituted for years and no steps had been taken to prosecute it. Plaintiff was personally and officially aware of said proceedings and transactions and took no legal steps to prevent the same, and this defendant supposed from the general reputation of plaintiff in such matters for sharpness, shrewdness, and finesse, that his said suit for damages was only instituted and continued from term to term in order to enable him, as a stockholder and director in the said H. & T. C. railroad company, to reap profits from said proceedings and transactions in excess of his co-stockholders and directors.

Seventh. In consideration of the premises, this defendant pleads in reconvention as damages sustained by it, resulting directly from the breaches of his said contract, his fraudulent representation, his evasion, imposition and bad faith, as hereinbefore set forth, the sum of $25,000 against said plaintiff, and prays that it may have and recover judgment against him for said sum of money, and further prays for all costs of suit and for general and equitable relief, etc.

HERRING, ANDERSON & KELLY,
Att'ys for Waco Tap Railroad Co.

Filed June 6th, 1878.

Consolidated and Amended Answer of the Houston and Texas Central Railway Company.—Filed Nov. 8th, 1878.

In district court of McLennan county.

Thomas M. Shirley
vs. } No. 1779.
The Waco Tap Railroad Company et al.

And now comes the Houston and Texas Central Railway Company, one of the defendants herein, by leave of the court first had and obtained, and consolidates its several answers herein filed
36 and amends the same, and presents the following answers and defenses, substituting them for the originals:

First Original Answer.—Filed May 4th, 1876.

1st. This defendant demurs to the plaintiff's petition, and says that the same and the matters and things therein contained and set forth in manner and form therein stated are wholly insufficient in law, and that this defendant prays judgment of the court thereon whether, etc.

2d. And not waiving but still insisting upon its above and foregoing demurrer, if required to make further answer, this defendant denies each and every allegation in said petition contained, and says that the same are not true as therein stated, and puts itself upon the country, etc.

Second Amended Answer.—Filed Dec. 29th, 1877.

1st. That the said plaintiff, his action aforesaid against this defendant did not commence and sue within two years after the cause of such action or suit, and this the said defendant is ready to verify, etc.; wherefore this defendant says that said action is barred by the statute of limitations in such cases made and provided.

2d. That said plaintiff, his action aforesaid against this defendant did not commence and sue within four years next after the cause of such action or suit, and this the said defendant is ready to verify; wherefore this defendant says that said plaintiff is barred by the statute of limitations in such cases made and provided.

3d. That the said Waco and Northwestern Railroad company was originally chartered under the name and style of the Waco Tap Railroad company on the 5th day of June, A. D. 1866; that it was provided in and by the terms of its charter: "Sec. 13. That said company * * shall have completely graded at least twenty-five miles of said road within two years from the passage of said act, and twenty-five miles shall be graded every year thereafter." That said company did not have twenty-five miles of said road within two years from the passage of said act, or any single mile thereof, so graded within the specified time; and it became and was necessary for said company to apply to the legislature for relief, and said company did so apply to a subsequent legislature, and on the 8th day of August, 1870, there was passed by the legislature an act for its relief, entitled "An act to amend sections one, two, three, five, six, eleven, twelve, thirteen, nineteen, and twenty of an act to incorporate the Waco Tap Railroad company," approved August 8th, 1870, wherein it was provided
37 among other things that the name of the company should be changed to the Waco and Northwestern Railroad company, and that said company shall complete and have in running order twenty miles of said road on or before the 1st day of December, A. D. 1871; that afterwards, when nearly five years after the passage of the said original act had elapsed, during all of which time the said railway had been struggling to make some progress in the construc-

tion of its road without having accomplished scarcely anything to that end, to wit, on the 10th day of June, A. D. 1871, it had not a mile of road built; it was without any available means; it was wholly without credit; and it was evident to every man of ordinary sagacity and foresight that said company was not in a condition to and could not possibly comply with the provisions of its charter by having twenty miles of its road completed by the first day of December then next ensuing, that is to say, in less than six months; with the forfeiture of its charter impending, and the great desideratum being the completion of the road to Waco, to which every other consideration was subservient, the said Waco and Northwestern Railroad Company applied to this defendant to come to its rescue and save its charter and charter rights.

4th. That the said Waco and Northwestern Railroad company, on the 10th day of June, A. D. 1871, needed aid in the construction and completion of its road in order to save its charter from forfeiture, and without such aid from this defendant it was wholly unable, by reason of its pecuniary condition and total want of credit, to complete and equip its road in accordance with the terms of its charter; and in its necessity and extremity it applied to this defendant, the Houston and Texas Central Railway company, for the material aid necessary to the building and construction of its said road; that negotiations were entered into between said railroad company and this defendant, which resulted in a contract and agreement being entered into on the said 10th day of June, 1871, in and by which the said parties mutually undertook, agreed, and contracted, each to and with the other, as set forth and explained in the written articles of agreement, a copy of which is hereunto annexed and made a part hereof, marked "Exhibit A," which undertakings, agreements, and covenants on the parts of the said parties are here pleaded in their very terms, and according to their tenor and effect respectively, and without further recitals therefrom.

5th. That afterwards, to wit, on the 31st day of October, A. D. 1871, the said parties made and entered into another contract and agreement in writing, a copy of which is hereunto annexed, marked "Exhibit B," by which the original contract, as set forth in
38 "Exhibit A," was modified and changed in several respects, and from the date last mentioned the said instruments of writing, "Exhibits A and B," taken and construed together, express the several stipulations and agreements by which the said parties respectively bound themselves each to the other, and the same are here pleaded in their very terms without further recitals therefrom.

6th. That in and by the 5th article of the said original contract, "Exhibit A," the said Waco and Northwestern Railroad company agreed to convey, and did thereby convey and transfer to this defendant, upon condition that this defendant would do and perform all and singular what it had undertaken to do and perform in said contract, "Exhibit A," and upon such performance the title thereto to become absolute and complete. First, all and every the interest

and claim of the said Waco and Northwestern Railroad company in and to 150 acres of land conveyed by — Taylor to John T. Flint in trust, being the point selected for a depot next above Bremond, in Falls county. Second, the interest and claim of the said Waco and Northwestern Railroad company in and to sixty-two acres of land at Marlin, also conveyed to and held by said John T. Flint in trust for use, etc. Third, that tract of twenty acres of land upon which the depot in Waco now stands. That this defendant did and performed all that it had undertaken in said agreement, "Exhibit A," and upon such performance the title to said property vested in this defendant and became absolute and perfect in so far as the said Waco and Northwestern Railroad company could convey the same, and the consideration moving said company to make said conveyance was in part the consideration for the building of said railway from Bremond to Waco, and not as a security, or otherwise than as part of the consideration aforesaid.

7th. That the said Waco and Northwestern Railroad company, in and by the 6th article of said agreement, "Exhibit A," in consideration of the agreements, undertakings, and covenants on the part of the Houston and Texas Central Railway company, to be by it done, executed, and performed, agreed to execute its bond to this defendant for the sum of six hundred thousand dollars, gold, ($600,000, gold,) payable on or before the 1st day of January, 1873, and to secure the payment of the same by a deed of trust by which was to be conveyed the franchise or chartered rights of the said Waco and Northwestern Railroad company, road-bed, right of way, and other privileges and appurtenances of its railroad to Peter W. Gray and Benjamin A. Botts as trustees, empowering them, or either of them, to sell and convey said property in satisfaction of said bond in the event of failure on the part of said Waco and
39 Northwestern Railroad company to comply with their agreement, to wit: First, If the said railroad company, party of the first part, should fail to grade the road and furnish the cross-ties from Marlin to Waco by the 1st of June, 1872, then the said bond should be considered due and payable, and the trustees should sell according to said deed; or, second, If said Waco and Northwestern Railroad company should fail to pay the said six hundred thousand dollars by the first day of January, A. D. 1873, then the trustees should sell according to said deed, all of which will more fully appear by reference to the said contract or instrument of writing, "Exhibit A," annexed hereto. That afterwards and in pursuance of said contract, the bond for $600,000.00, gold, was executed and delivered to this defendant, and a copy thereof is hereunto annexed, marked "Exhibit C," and made a part of this petition, for reference, without further recitals therefrom.

8th. That on the day of date last above mentioned, to wit, on the 6th day of July, 1871, and in compliance with and in the execution of said contract, "Exhibit A," the said Waco and Northwestern Railroad company made, executed, and delivered to this defendant

its certain deed in trust conveying to said P. W. Gray and B. A. Botts, as trustees, for the use of this defendant, "all and singular the several tracts and parcels of land which might then or thereafter constitute the site of the railway, turnouts, depot grounds, and appurtenances, and all lands which then were or might thereafter constitute and be a part of the road and right of way thereof of the said Waco and Northwestern Railroad company from the town of Bremond, where it connected with the road of the Houston and Texas Central Railway company, to the depot grounds in the city of Waco, on the east side of the Brazos river, and thence as authorized by the charter of said Waco and Northwestern Railroad company, and also the cross-ties and other superstructure which had then or might thereafter be constructed, placed, and built on the line of said road as aforesaid, and also all and singular the chartered rights, privileges, and franchises of every kind granted to said Waco and Northwestern Railroad company by acts of the legislature of the state of Texas of which it might then or thereafter be possessed, or become entitled to under the laws of the state of Texas relating to railroads;" of which deed in trust a copy is hereunto annexed and made a part of this petition, marked "Exhibit D," and the same will be read and considered as here inserted in its very terms.

9th. That this defendant immediately proceeded in compliance with and in the execution of the agreement and undertakings on its part agreed and undertook to be done and performed, and in all things did and performed all that was required of it, and completed the said railroad from the connection thereof in the town at Bremond to the depot grounds at the designated point on the east side of the Brazos river, in the city of Waco aforesaid, and within the time prescribed for the completion of the same.

10th. That the said Waco and Northwestern Railroad company was wholly unable to comply on its part with the terms and conditions of said contract, "Exhibit A" and "Exhibit B;" it was without money wherewith to pay said bond at maturity, and it was without credit upon which it could in any manner raise the money wherewith to pay said bond, "Exhibit C;" and when the same became due and payable said railroad company made default and wholly failed to pay the same or any part thereof, and thereupon, at the request of this defendant, the said Gray and Botts, trustees, proceeded to foreclose the said deed in trust, "Exhibit D," and in so doing in all things complied with the terms and conditions in said deed set forth and contained; and at the sale made in pursuance of deed of trust by said Gray and Botts, trustees, to wit, on the 4th day of February, A. D. 1873, this defendant purchased all and singular the property therein mentioned in said trust deed as conveyed to said trustees for the sum of four hundred thousand dollars, which sum, less the sum of five hundred and twenty-four dollars commissions to said trustees, and costs of advertising the sale, was credited on said bond; and thereupon the said trustees made, executed and delivered their certain deed of conveyance, whereby they conveyed

to this defendant all and singular the property, rights, privileges, and franchises in said deed of trust mentioned and conveyed. This defendant now files said original deed and marks the same "Exhibit E," and makes the same a part of this answer, to be read and considered as here inserted. And this defendant thereupon, to wit, on the 4th day of February, A. D. 1873, and when it purchased said property at said trustees' sale, as aforesaid, entered into and upon said property and took possession thereof, and has had and held the same as its own property, and continues to have and hold the same in the full and absolute enjoyment thereof.

11th. That the said Waco and Northwestern Railroad company was wholly unable to carry out the said original contract, "Exhibit A," on its part, and that said contracting parties found it convenient and advisable, for the better and more certain fulfilment of said contract, "Exhibit A," that the terms thereof should be modified and changed and other, further, and additional stipulations made, to effect the object of said agreement as originally entered into; and thereupon the said original contract was modified and changed so that the time for the laying of the iron rails and completing the railroad
41 from Bremond to Marlin was extended from Jan'y 1st, 1872, to March 1st, 1872, and in further consideration of changes, modifications, and alterations made in said original contract, "Exhibit A," by the supplementary agreement, "Exhibit B," and especially in consideration of this defendant's releasing the said Waco and Northwestern Railroad company from clearing, grubbing, grading, and furnishing ties for said railroad from Bremond to Waco, as remained unfinished at the date of said supplemental contract, "Exhibit B," to wit, on the 31st day of October, A. D. 1871, and the assuming by this defendant the work of completing the grading yet remaining to be done on said road, and providing and furnishing the cross-ties remaining to be supplied, the said Waco and Northwestern Railroad company undertook and promised and agreed to transfer and deliver to this defendant $100,000.00 of the coupon bonds of the city of Waco, to be issued to the party of the first part, the said Waco and Northwestern Railroad company, by the city of Waco, under an ordinance of said city of the 7th of October, A. D. 1871, which transfer and delivery was to be made at the several times as thereinafter expressed, and which transfer and delivery was afterwards made to this defendant as stipulated and provided as aforesaid; and at the same time, in further consideration of the premises aforesaid, the said Waco and Northwestern Railroad company performed and agreed that upon completion of its said railroad, according to the contract, to the town of Marlin, it would issue and deliver to this defendant certificates of full-paid stock in its company for 1,000 shares of fifty dollars each, amounting to $50,000; and upon completion of said railroad to the city of Waco it would issue to this defendant certificates to like number and amount in addition to the shares first above mentioned, in all to the amount of

$100,000.00, which shares, in compliance with said agreement, were issued and delivered to this defendant.

12th. That this defendant, under and in compliance with and in the execution of said contracts, "Exhibits A and B," did, with its own means and money, build and construct said railroad from Bremond to Waco; and in consideration therefor, and not otherwise, received of and from said Waco and Northwestern Railroad company, at and before February 4th, 1873—

1. The interest of said Waco and Northwestern Railroad company in and to 150 acres of land, conveyed by —— Taylor, in trust, to John T. Flint, being the point selected for a depot next above Bremond; that the same was of no value, the title thereto having failed.

2. The interest of said Waco and Northwestern Railroad
42 company in and to 62 acres of land at Marlin, conveyed to John T. Flint in trust for said railroad and others; of value not exceeding $5,000.

3. The tract of twenty acres of land in one body in Waco, on the east side of the Brazos river, the present depot grounds; of value not exceeding $5,000.

4. One hundred thousand dollars of the coupon bonds of the city of Waco; of value doubtful and precarious, and wholly worthless as an available asset, nothing as yet having been realized therefrom.

5. One hundred thousand dollars of the stock of said Waco and Northwestern Railroad company, which was of no value, represented by the bonds of the same amount issued by the city of Waco, as aforesaid.

6. The bond and mortgage for $600,000 gold, secured by the deed of trust, to pay which the said road and other property of said Waco and Northwestern Railroad conveyed to said Gray and Botts was sold as hereinbefore set forth.

13th. That the said Waco and Northwestern Railroad company was merged in the Houston and Texas Central Railway company, by an act of the legislature of the state of Texas, entitled "An act to provide for the merger of the Waco and Northwestern Railroad company, with its properties, rights, privileges, and franchises in the Houston and Texas Central Railway company," approved May 24th, 1873. That at the time of the passage of said act, the said Waco and Northwestern Railroad company had then already conveyed all and singular its property, rights, privileges, and franchises herein above mentioned and set forth as having been received by this defendant in consideration for the execution of said contract for the building of said road by this defendant; and at and after the said act of merger, no property, rights, privileges, or franchises of the said Waco and Northwestern Railroad company ever came into the possession of this defendant under or by virtue of said act of merger.

14th. That all of said parties to said deed of trust, "Exhibit D," the grantor therein, the said Waco and Northwestern Railroad company, both before, at the time of, and after the execution of said deed of trust, intended that the then inchoate right to the land to which

the said railroad company would become entitled to receive as a donation from the state of Texas, viz., the land grant of sixteen sections for each mile of constructed road, should be included in said deed of trust, and conveyed thereby as a part of the security for the payment of said bond for $600,000, "Exhibit C;" and that said defendant charges that the same was not only intended to be conveyed, but was actually conveyed by the very terms of said deed of trust to the said trustees, and by said trustees to this defendant after the sale and foreclosure aforesaid, the same
43 being included within and as a part of "All and singular the chartered rights, privileges, and franchises of every kind granted to the said Waco and Northwestern Railroad company by acts of the legislature of the state of Texas, which are now possessed by it, or to which it may hereafter become entitled under said acts and laws of Texas relating to railroads." But as some question had been raised in the general land office of the state of Texas as to how and in what manner the certificates to the land grant to said Waco and Northwestern Railroad company should be issued, and in order that no question or doubt might be raised in the future as to the right and title of this defendant to the certificates for the said land grant, the said sale so made by the said trustees was afterwards ratified, confirmed, and approved by the board of directors of the said Waco and Northwestern Railroad company, of which the said Thomas M. Shirley was a member; and by a resolution of said board the president of said company was authorized and instructed to make another and a special transfer and conveyance of said land grant, and to recite in such conveyance as the consideration thereof the sum of two hundred thousand dollars, that being the amount remaining due and unpaid by the Waco and Northwestern Railroad company on said bond, for the payment of which the said deed of trust was foreclosed, after crediting the amount bid by this defendant at sale, to wit, $400,000 gold, less $524.00, trustees' commissions and cost of advertising; and in pursuance of such authority, the president of said Waco and Northwestern Railroad company, for and in the name of said company, made, executed, and delivered such special transfer and conveyance to this defendant, the original of which is now on file in the general land office in the state of Texas, and a certified copy of the same will be exhibited on the trial of this cause. That at the said meeting of the board of directors of the Waco and Northwestern Railroad company, held, to wit, on the 24th day of June, A. D. 1874, in the city of Waco, at and by which the president of said company was authorized to make the special transfer and conveyance aforesaid of said land certificates and land grant to this defendant, the said Thomas M. Shirley appeared, claimed, and took his seat as a member of said board, and acted as a director of the said Waco and Northwestern Railroad company; that no quorum of said board of directors could be had without the personal presence of the said Thomas M. Shirley, and this he well knew, and he went from his home in Houston to Waco for the express purpose of attending

said meeting of the board in person, to make and complete the number necessary to form a quorum, when he well knew that without his personal presence no quorum could be had, and no meeting for the transaction of any business held; and he vol-
44 untarily appeared, and blew hot and cold by making some protest which was never followed up by any affimative action on his part; and this defendant says that the said Shirley is estopped, and his mouth forever closed to assert that said board was illegally organized or constituted, or that its action was in any manner illegal or invalid, he being a member thereof, and being present and participating in its action and deliberations.

15th. That the said Thomas M. Shiley, the plaintiff in this suit, was on the first day of January, A. D. 1870, and for several years next ensuing, to wit, for five years, and more thereafter, a stockholder and the owner of a large number of shares of the capital stock in the said Houston and Texas Central Railway company, to wit, 500 shares and more, some few of which he held in his own name, but the larger number thereof, being in an embarrassed condition pecuniarily, he held in the name or names of other parties and beyond the reach of creditors, which stock he held believing the same to be of great value and daily increasing in value by reason of the acquisition of said Waco and Nortwestern Railroad company, its franchises and property, by the Houston and Texas Central Railway company; and that during the several years, to wit, from the year 1869 to the year 1876 he was so a stockholder, and he well and thoroughly knew, was informed and advised, of all of the actions and doings of this defendant in and about the making of said contracts with the Waco and Northwestern Railroad company of the 10th of June, A. D. 1871, "Exhibit A," and of the making of said supplementary contract of October 31st, 1871, "Exhibit B," and of the execution and delivery of said bond for $600,000.00, "Exhibit C," and of the execution of the deed of trust to secure the same, and the delivery thereof by the said Waco and Northwestern Railroad company to this defendant, and the acceptance of the same by this defendant, and of the building and construction of said railroad from Bremond to Waco by the defendant, and of the large outlay of capital and money by this defendant, laid out and expended in the execution of said contract, for the construction of said railroad; yet he, the said Shirley, made no objection thereto as a stockholder in the Houston and Texas Central Railway company, or otherwise, but stood by and permitted this defendant to enter into said contracts for the construction of said railroad from Bremond to Waco, and lay out and expend its money and capital in the execution of said contracts, without objection, but assenting thereto and acquiescing in all that this defendant was doing in and about the construction of said railroad; and the said Thomas M. Shirley, the plaintiff herein, ought not now to be admitted or be heard to assert that this
45 defendant was without authority to make said contracts for the construction of said road, or that its actings and doings in the premises were *ultra vires*.

16th. That the said plaintiff, Thomas M. Shirley, being a stockholder in the Houston and Texas Central Railway company on the 6th day of May, A. D. 1872, was at the annual charter meeting of the stockholders of this defendant, the Houston and Texas Central Railway company, elected a director and a member of the board of directors of this defendant, and thereupon accepted and entered upon the discharge of his duties as such officer, and was thereupon appointed upon the executive committee of said board of directors, upon which committee devolved the principal administration of the affairs of said corporation. That he held and discharged the duties of director and member of the executive committee from the first Monday in May, 1872, to the first Monday in May, 1873, when upon said last mentioned day he was re-elected a director for the ensuing year, and soon after was again appointed a member of the executive committee, which offices he accepted and held until the 1st Monday in May, 1874. That a large part of the work of constructing said railroad under said contracts, "Exhibit A" and "Exhibit B," was carried on and completed under the administration of the board of directors of the Houston and Texas Central Railway company and of the executive committee thereof, of which board and committee said plaintiff was a member as aforesaid; that he not only made no objection, opposition, or protest to the actings and doings of this defendant in the carrying out of said contracts for the construction of said railroad thereunder, but acted and assisted by his consent and advice in the execution of said contracts and the building of said road. That soon after the purchase of the said Waco and Northwestern Railroad, and other property mentioned in said deed of trust, by this defendant, to wit, on the 11th day of February, 1873, the said Wm. J. Hutchins, vice-president, made a report of said purchase to the board of directors then convened, and thereupon it was unanimously "*Resolved*, That the action of Mr. Hutchins in making said purchase be approved, and that the proper officers of this company be authorized to take such steps as may be necessary to perfect said purchase." That at said meeting the said Thomas M. Shirley was present as a member of said board, and acquiesced and assented to said resolution. That afterwards, to wit, on the 11th day of June, A. D. 1873, at a meeting of the board of directors of this defendant's company, at which meeting the said Thomas M. Shirley was present and participated, a resolution of said board was unanimously adopted authorizing the issuance
46 by said company of a series of bonds of one thousand dollars each, at the rate of $20,000.00 to each mile of completed road, commencing at Bremond and thence along the line of the said Waco and Northwestern Railroad; and the making, execution, and delivery of a deed of trust conveying said Waco and Northwestern Railroad, etc., and also six thousand acres of land per mile out of the land grant of sixteen sections of land per mile donated by the state of Texas to aid in the construction of the said Waco and Northwestern Railroad. That the said bonds and deed of trust

were, in conformity with said resolution, afterwards issued and disposed of to various capitalists investing therein. A printed copy of said deed of trust, containing a description of said bonds so authorized to be issued and issued, is herewith filed for reference and marked "Exhibit E;" that by reason of acquiesence of the said Thomas M. Shirley in the matters and things hereinbefore set forth; by reason of his active participation in the said several matters and things, and the actings and doings of this defendant in relation to the construction and building of said Waco and Northwestern Railroad; by his approval of the purchase thereof at the said sale under the said deed of trust; by his acquiescence and approval of the issuance of said bonds and the mortgage of the said road and lands granted to aid in the construction thereof, which he, the said Shirley, plaintiff herein, did while acting as a director for this defendant, and as a member of the executive committee of said board, he ought not now to be admitted, or heard to question, or impeach either one or any of the actings and doings of this defendant in the premises, or to assert that this defendant was acting without authority therein, or that any of its actings and doings in the premises were *ultra vires*.

17th. That in all the actings and doings of this defendant in and about the premises, from the time of entering into said original contract, "Exhibit A," until the final execution thereof and the completion of said road according to agreement, and the purchase of the same and the other property under said deed of trust, has been characterized by the utmost good faith and fair dealing towards the said plaintiff and the world, and this defendant denies that it was guilty of any act, open or covert, or of any fraud, actual or constructive, of which the said Shirley has any grounds or right to complain against this defendant, or have any relief from it upon any principle of law or equity. This defendant denies that it has now in its possession or under its control, or ever had in its possession or under its control, any of the property, rights, choses in possession or in action, privileges or franchises, of the said Waco and Northwestern Railroad company upon which the said plaintiff has now or had at any time ever had any lien
47 or charge, legal or equitable, for the payment of any claim, real or pretended, which he has or may assert. It denies that any of the property of any kind, nature, or description, rights, privileges, franchises, or other thing whatever of the said Waco and Northwestern Railroad company came into the possession or under the control, or was merged in, this defendant, the Houston and Texas Central Railway company, by the said act of merger hereinbefore referred to, but that all of the property of the said Waco and Northwestern Railroad company, its rights, privileges, and franchises, which did in fact come into the possession of this defendant, was acquired by this defendant, and had been in its possession and under its control and management, and this defendant had been in the enjoyment thereof, long before the said act was passed and approved, and the only object, intent, purpose, and effect of said act was to have and

obtain legislative sanction to the transfer and assignment, which had then already been made; the state of Texas then being the only party in a position to make objection to such transfer and assignment.

18th. And this defendant now avers that all and singular the property, rights, privileges, and franchises of the said Waco and Northwestern Railroad company, which has ever come into the possession and control of this defendant, at any time, was acquired by it under and by virtue of said contracts aforesaid, and by purchase under said deed of trust; and that this defendant, as respects all and singular the said property so acquired by it, occupies the position of and is a purchaser in good faith, for valuable consideration paid, without notice of any adverse right, title, or legal claim, if any such in fact exist.

19th. And now this defendant says that in view of all the matters and things herein set forth and pleaded, and now here reiterated, the said Shirley, if any cause of action he ever had or might have had against this defendant, has slept upon them so long a time, to wit, during the current period of five years, and has been guilty of such laches in the assertion thereof as precludes him from any recovery against this defendant; and this defendant now pleads his said laches in bar of this action, and that his said action is a stale demand, which he ought not to be permitted to assert.

20th. And further answering herein, this defendant, the Houston and Texas Central Railway company, avers and charges against said Thomas M. Shirley as the said Waco Tap Railroad company in and by its answer in this suit hath averred and charged, and adopts each and every allegation made by the said Waco Tap Railroad company in its answers herein in bar of this action. And all of which
48 matters and things herein pleaded this defendant is ready to verify and prove before the country, etc.

GEO. GOLDWAITE,
For said Defendant.

Exhibit A.

This agreement, made and entered into between the Waco and Northwestern Railroad Company, a body politic and corporate under the laws of the state of Texas, herein acting by John T. Flint, president of said company, party of the first part, and the "Houston and Texas Central Railway Company," a body politic and corporate under the laws of said state of Texas, acting by Abraham Groesbeeck, vice president of said company, party of the second part, witnesseth:

That whereas the party of the first part needs aid in the construction and completion of its railroad from the town of Bremond, in Robertson county, to the city of Waco, in laying the superstructure and iron on said road, and putting it in running order, which aid the party of the second part is willing to give upon sufficient security therefor.

Now, therefore, it is stipulated and agreed between and by said parties as follows, to wit:

First. That the party of the first part shall proceed and complete the work of constructing the road-bed and grading of their railroad, with the maximum grade not to exceed fifty-two and eight-tenths feet per mile, and the curvatures not to be less than nineteen hundred feet radius, from its connection with the Houston and Texas Central Railway, at Bremond, to the town of Marlin, in Falls county, by the first day of November next, eighteen hundred and seventy-one (1871), and thence to the depot grounds, hereinafter named, within the limits of the city of Waco, on the east side of the Brazos river, on or before the first day of June, eighteen hundred and seventy-two (1872); and will also furnish, deliver, and distribute along the right of way of said railroad, at distances in piles of about fifty ties each, for conveniently laying the same on the road-bed, twenty-two hundred (2,200) cross-ties per mile, the said cross-ties to be of post oak, nine feet in length, six (6) inches in thickness, and hewed or sawed to face eight (8) inches on two parallel sides, and to be of good quality and soundness.

49 Second. The party of the first part agrees and guarantees that it will perfect its title to the right of way for their road from Bremond to the depot grounds in Waco aforesaid, and that their franchises, property, and road are free from all debts, liens, and incumbrances prior to this contract, and that it will protect the party of the second part from liability for any debts.

Third. In consideration of the foregoing stipulations and the performance thereof by the party of the first part, and also the securities hereinafter mentioned to be executed by the party of the first part, it is agreed by the party of the second part that it will lay the cross-ties furnished and delivered as aforesaid on said road-bed, procure and lay the iron rails and other superstructure, and complete and put said railroad in running order, (it being understood that no masonry work is required to be done,) and have locomotives and cars running on the same to the said town of Marlin by the first day of January, eighteen hundred and seventy-two (1872), and thence to the depot grounds in the city of Waco on or before the first day of October, eighteen hundred and seventy-two (1872), provided that the performance within either of said periods shall not be unavoidably prevented by the loss of iron or delay in its delivery resulting from dangers of the sea in its transportation, or epidemics prevailing on the route of transportation, in which event occurring there shall be an extension of four months allowed for performance after the periods aforesaid; or unless prevented by obstruction of the right of way over lands by property owners from whom the right shall not have been procured by the party of the first part, in which case the time of completion shall be extended for the period of such obstruction and delay caused thereby.

Fourth. As security and indemnity to the party of the second part for the outlays of money to be paid and expended in procuring

the iron, laying the superstructure, and completing the said railroad according to the foregoing stipulations, the party of the first part agrees that when and as soon as any part of their said railroad shall be completed and put in running order according to this agreement, such portion of said railroad shall remain and continue in possession of the party of the second part as lessees thereof; and that said party shall have, and is hereby granted, exclusive control and use of all said railroad which shall be so completed, and may run or operate the same for its own benefit and under its direction as to tariff of charges and all other respects until the first day of January, eighteen hundred and seventy-three (1873), paying for such use as lessees the annual rent of ten dollars; and that this article of this agreement shall be taken and considered as a lease of said railroad so completed for the time aforesaid.

Fifth. The party of the first part agrees to convey and transfer, and does convey and transfer, upon condition that the party of the second part shall perform the work aforesaid according to this agreement, and upon such performance the conveyance and transfer to become absolute and complete, the following-described property, to wit:

1. All their interest and claim in and to one hundred and fifty (150) acres of land, conveyed by —— Taylor to John T. Flint in trust, being the point selected for a depot next above Bremond, in Falls county, and now held by said Flint as trustee for the benefit of said Taylor and the party of the first part. And, 2. Their interest in and to sixty-two (62) acres of land at Marlin, conveyed to and held by said John T. Flint in trust for the party of the first part and others, part owners of said property—the party of the second part to have and take the rights of the party of the first part under said deeds of trust. And, 3. That tract of twenty (20) acres of land in one body within the corporate limits of Waco, on the east side of the Brazos river, for depot purposes, being the tract adjoining the suspension bridge property, which is held and contracted for by title from J. D. Giddings and others; and the party of the first part agrees to make or cause to be made such further conveyances therefor as may be necessary to secure the party of the second part in the right to said property; but should the party of the first part fully comply with their agreement and pay the bond for six hundred thousand dollars ($600,000) hereinafter mentioned, then the property conveyed shall revert to the party of the first part, and retransfers thereof shall be made.

Sixth. The party of the first part further agrees to execute to the party of the second part a bond for the sum of six hundred thousand dollars, gold, ($600,000,) payable on or before the first day of January, eighteen hundred and seventy-three, (1873,) and a deed of trust to secure the same, by which there shall be conveyed the franchise or charter rights of the party of the first part, road-bed and right of way, and other privileges and appurtenances of their railroad to Peter W. Gray and Benj. A. Botts as trustees, empowering them, or either

of them, to sell and convey said property in satisfaction of said bond, in the event of the failure of the party of the first part to comply with their agreements, to wit: 1st. If they should fail to grade the road and furnish cross-ties from Marlin to Waco by the first of June, eighteen hundred and seventy-two, (1872,) then said bond shall be considered due and payable, and the trustees shall sell according to said deed; or, 2d. If they should fail to pay the said six hun-
51 dred thousand dollars ($600,000) by the first day of January, eighteen hundred and seventy-three, (1873,) then the trustees shall sell according to said deed. But if the party of the first part shall fully comply with its agreements aforesaid and pay said bond when due, then the deed of trust to be void, and the property shall revert to the party of the first part.

And if the party of the second part shall fail to complete said railroad to Marlin according to agreement, or to Waco in like manner, the party of the first part not being in default in fulfilling this agreement, then the deed of trust shall be void; and that all rights acquired under this agreement, and all work done and materials furnished to said railroad by the party of the second part, shall revert to and become the property of the party of the first part.

Seventh. It is further agreed in furtherance of the objects of this contract, and for the security of the parties, that the party of the second part will pay the proceeds of lots heretofore sold at Bremond for joint account, to wit, the sum of about fifteen thousand six hundred dollars ($15,600.00) coin, for account of the cross-ties to be furnished by the party of the first part, such payment to be made on orders drawn by the president of the "Waco and Northwestern Railroad company" upon the treasurer of the "Houston and Texas Central Railway company," accompanied by certificates of the engineer of the former company of the actual delivery of said cross-ties, in lots of not less than five thousand (5,000) ties at a time. And the party of the first part hereby agrees to release and relinquish all further interest in the land or lots at Bremond not already sold and the proceeds thereof.

Eighth. The party of the first part further agrees and guarantees that the stock of its company, subscribed and issued, does not exceed two hundred and twenty-five thousand dollars ($225,000.00), and that said stock shall not be increased, nor issued to an amount greater than said sum, without the consent of the party of the second part.

Ninth. It is agreed that the party of the second part may adopt such gauge as they may deem best, not less than four feet eight and a half inches for said railroad, and lay the track accordingly from Bremond to Waco, and also that all the work to be done by the party of the second part on said road in completion of the same shall be done under the exclusive direction and control of the engineer appointed by the party of the second part.

Tenth. It is further agreed that after the first of January, eighteen hundred and seventy-three (1873), the possession, use and control of the said railroad shall belong to and remain with the party of the

second part as lessees, on the terms hereinbefore mentioned,
52 until the said sum of six hundred thousand dollars ($600,000) in gold coin shall be full paid and discharged, or until the said railroad and other property shall be sold under the deed of trust aforesaid, and that the party of the second part shall only be held accountable for the use thereof at the rate of ten dollars per annum for such time, and for no greater rate of compensation.

Eleventh. It is further agreed that in case of any disagreement arising in relation to the compliance by either party with the terms of this agreement, the subject of such dispute or disagreement shall be referred by the parties to three arbitrators, to be selected one by each party and the third selected by the two so chosen by the parties, and that the decision of such arbitrators shall be binding on the parties; and that this article shall be a bar to any suit instituted by either party.

Twelfth. This agreement is to be ratified by vote of the stockholders and board of directors of the party of the first part, and by the board of directors of the party of the second part, within thirty (30) days from this tenth of June, eighteen hundred and seventy-one (1871), and such ratification to be authenticated by the secretary and seal of the respective parties, to be executed in duplicate.

Thirteenth. The depots as located at the town of Marlin and city of Waco shall not be changed beyond the limits of said town or city without the consent of either respectively.

In witness whereof the parties sign this agreement in duplicate at Houston this 10th day of June, eighteen hundred and seventy-one (1871).

Witness, the Waco and Northwestern Railroad Company, by John T. Flint, president of said company, and the seal [SEAL.] thereof.

(Signed) JOHN T. FLINT.

Attest:

D. T. CHAMBERLAIN, *Sec'y.*

Witness, the Houston and Texas Central Railway Company, by A. Groesbeeck, vice-president of said company, and the seal [SEAL.] thereof.

(Signed) A. GROESBEECK,
Vice-President.

Attest:

H. HALL, *Acting Sec'y.*

53 "*Exhibit B.*"

This supplementary agreement, made between the Waco and Northwestern Railroad company, a body politic and corporate under the laws of the state of Texas, herein acting by John T. Flint, president of said company, party of the first part, and the Houston and Texas Central Railway company, a body politic and corporate under the laws of said state of Texas, herein acting by Abraham Groes-

beeck, vice-president of said company, party of the second part, witnesseth:

Whereas an agreement was made between said parties, bearing date the 10th day of June, 1871, for the purpose of constructing and completing the railroad of the party of the first part from Bremond, in Robertson county, to the city of Waco, in McLennan county, upon certain terms and conditions therein mentioned; and whereas, it is found convenient and advisable for the better fulfillment and more certainly to carry out said contract that some of the terms thereof shall be modified and changed, and additional agreements made in order to effect the objects of said agreement, but not to release any security heretofore given: now, therefore, it is further stipulated and agreed between and by said parties as follows, to wit:

The party of the first part for and in consideration of the agreements and covenants by the party of the second part, hereinafter specified and mentioned to be done and performed by the party of the second part, agrees—

First. That it hereby modifies the said contract of 10th of June, 1871, so that the time for the laying of the iron rails and completing and putting in running order of the said railroad from Bremond to Marlin, in Falls county, shall be and is extended from the first of January, 1872, to the first day of March, A. D. 1872, and that the completion thereof to said point by that time shall be deemed and taken as a full compliance by the party of the second part with that part of its contract aforesaid to construct to the town of Marlin, and its security under the deed of trust given by the party of the first part shall stand valid and unimpaired by this extension of time, or any other provisions of this additional contract.

Second. That the party of the first part will transfer and deliver to the party of the second part one hundred thousand dollars of the coupon bonds of the city of Waco, to be issued to the party of the first part by said city, under an ordinance of said city of the seventh of October, 1871, ten thousand dollars of which shall be transferred and delivered whenever the party of the second part shall have completed and paid for forty thousand cubic yards of earthwork according to the
54 specifications of the chief engineer of the party of the first part, between the town of Marlin and the city of Waco, to be certified to by said engineer, and upon the completion of every forty thousand additional cubic yards of said earthwork by the said party of the second part, between said points according to specifications aforesaid, the said party of the first part shall transfer and deliver to the party of the second part ten thousand dollars additional of said Waco city bonds, until the entire grade be completed from the said town of Marlin to the depot grounds in the city of Waco; and whenever the party of the second part shall have put the cross-ties on the road, according to specifications of said contract, then the party of the first part will transfer and deliver to the party of the second part additional coupon bonds of the said city of Waco sufficient to amount in all to the said full sum of one hundred thousand

dollars, and being all of the bonds so held by the party of the first part to be issued by the city of Waco under said ordinance as aforesaid.

Third. That it will account with and pay over to the party of the second part the net proceeds of all of its remaining notes, accounts, claims for taxes, and other demands, and will furnish to the party of the second part, within thirty days, a complete list or account of said assets, and also copies and full statements of the contracts for grading and for cross-ties between Marlin and Waco, and of other liabilities of the party of the first part, to the liquidation of which the said assets may be applied.

Fourth. That upon the completion of said railroad according to contract to the town of Marlin aforesaid, it will issue and deliver to the party of the second part certificates of full paid stock in its company for one thousand shares of fifty dollars each, amounting to the sum of fifty thousand dollars; and upon the completion of said railroad to the depot grounds in the city of Waco, it will issue and deliver to the party of the second part further certificates of full paid stock in the company for the further amount of one thousand shares of fifty dollars each, amounting to the sum of fifty thousand dollars, for which stock the party of the second part now subscribes, the payment thereof to be made by the work to be done under this contract.

Fifth. That it will procure and perfect the rights of way not yet procured or perfected along the line or route of said railroad from Bremond to Waco, the payments therefor, when necessary to be made, to be deducted from proceeds of the assets of the party of the first part.

And the party of the second part, in consideration of the foregoing agreements and contracts, and the due performance thereof by the party of the first part, agrees, first, that it releases the party of the first part from so much of its agreement of 10th of June, 1871, to do the work of clearing and grubbing, grading, and furnishing cross-ties for said railroad from Bremond to Waco as now remains unfinished, which was required by the contract of 10th of June, 1871, and the party of the second part will complete the graduation work remaining to be done on said road, and will provide and furnish cross-ties remaining to be supplied therefor; and, second, it will take the place, rights and obligations of the party of the first part as to its contracts for graduation and furnishing cross-ties for said road between Marlin and Waco, including the contract of J. G. Dent, for graduation between those points estimated at about 200,000 cubic yards of earthwork, provided that the party of the first part guarantees that the whole amount of graduation work remaining to be done on the line of said road shall not exceed 270,000 cubic yards; and agrees to cause its chief engineer to furnish within thirty days, to the president of the party of the second part, an estimate of the actual amount of grading remaining to be done.

55

In witness whereof the said John T. Flint, as president, and D. T.

Chamberlin, as secretary, acting under authority of resolution of the board of directors of the party of the first part, hereto sign their names and affix the common seal of said party of the first part, this twentieth day of October, A. D. 1871; and the said Abraham Groesbeeck, vice-president, acting as president in the absence of the president, and A. S. Richardson, as secretary, acting under authority of resolution of the board of directors of the said party of the second part, hereto sign their names and affix the common seal of said party, first day of October, A. D. 1871.

Executed in duplicate.

(Signed) THE WACO AND NORTHWESTERN
[SEAL] RAILROAD COMPANY,
By JOHN T. FLINT,
President.

Attest:
(Signed) D. T. CHAMBERLIN, *Secretary, etc.*

(Signed) THE HOUSTON AND TEXAS CENTRAL
[SEAL] RAILWAY COMPANY,
By A. GROESBEECK,
Vice President, and Acting President.

Attest:
(Signed) A. S. RICHARDSON, *Secretary.*

56 "*Exhibit C.*"

Know all men, that the Waco and Northwestern Railroad company, a body politic and corporate, created by acts of the legislature of the state of Texas, is indebted in the just and full sum of six hundred thousand gold dollars to the Houston and Texas Central Railway company, a body politic and corporate, created by acts of the legislature of said state, which said sum of money it agrees and promises to pay the bearer of this bond on the first day of January, eighteen hundred and seventy-three; and if punctual payment be not made at maturity, also to pay interest on said sum of money at the rate of twelve per cent. per annum until payment thereof shall be made.

This debt is contracted for money loaned, paid and expended for iron rails and other material to be supplied and work to be performed in completing the railroad of said Waco and Northwestern Railroad company from the town of Bremond to the city of Waco, in pursuance of an agreement this day made between the parties; and its payment is secured and may be enforced by a deed of trust on said railroad, and upon the charter rights and franchises, property and appurtenances of said railroad company on the terms and contingencies, and at the terms mentioned in said deed, by the trustees therein at the request of the holder or holders of this bond.

In witness whereof, John T. Flint as president and D. T. Chamberlin as secretary of said company, acting by authority of the stockholders and board of directors thereof, hereto sign their names, and affix the seal of said Waco and Northwestern Railroad company at

the office of said company in Waco, on this sixth day of July, A. D. eighteen hundred and seventy-one.

[SEAL.] (Signed) JNO. T. FLINT,
Pres. W. & N. W. R. R. Co.

Attest:

D. T. CHAMBERLIN, *Secretary.*

"*Exhibit D.*"

This indenture, made and entered into the sixth day of July, eighteen hundred and seventy-one, between the Waco and North-
57 western Railroad company, a corporation created by acts of the legislature of the state of Texas, of the first part; and Peter W. Gray and Benjamin A. Botts, trustees as hereinafter mentioned, of the second part; and the Houston and Texas Central Railway company, a corporation created by acts of the legislature of the state of Texas, of the third part, witnesseth:

Whereas the party of the first part, formerly known as the "Waco Tap Railroad company," under an act of the legislature of Texas to incorporate said company, passed November fifth, eighteen hundred and sixty-six, is, by said act and by an act amendatory thereof, passed by the legislature on the sixth of August, eighteen hundred and seventy (1870), invested with the right to locate, construct, operate, own, and maintain a railroad on the route specified in the second section of said last named act, which route has been located from a point on the Houston and Texas Central Railroad, known as the town of Bremond, in Robertson county, to the city of Waco, on the east side of the Brazos river, in McLennan county, in the state of Texas; and said railroad has been partially constructed on said route by the party of the first part, needs additional means to enable it to procure the necessary iron rails and other material, and to lay the same, and do other work necessary to put said railroad in complete running order from Bremond to Waco, and to run locomotives and cars over the same;

And whereas an agreement has been entered into between the parties of the first part and third part, bearing date the tenth day of June, eighteen hundred and seventy-one, by which, among other things, the party of the third part has agreed and undertaken to advance the necessary money, and procure said iron rails and material, and to lay the same, and cause certain other work to be done necessary to put said railroad in running order to Marlin, in Falls county, by the first of January, eighteen hundred and seventy-two, and thence to Waco by the first day of October, eighteen hundred and seventy-two, upon the terms and contingencies in said agreement contained and specified;

And whereas, in pursuance of said agreement, the party of the first part has executed and delivered to the party of the third part its bond, of even date with this deed, for the sum of six hundred thousand dollars in gold coin, payable on the first day of January, eight-

een hundred and seventy-three, to the party of the third part or bearer of said bond; which bond is to be considered and held due and payable on the first day of June, eighteen hundred and seventy-two, in case the party of the first part shall fail to complete
58 the grading and deliver the cross-ties for said road between Marlin and Waco by that time, as stipulated in said agreement:

Now, therefore, for and in consideration of the premises, and to secure the payment of said bond, and compliance with agreement aforesaid by the party of the first part to the party of the third part, and for the sum of ten dollars paid by the parties of the second part to the party of the first part, the receipt whereof is hereby acknowledged, the party of the first part has bargained, sold, released, transferred, and conveyed, and does hereby bargain, sell, release, transfer, and convey unto the parties of the second part, and the survivors of them, and their and his successors and successor and assigns, all and singular the several tracts and parcels of land which now are, or may hereafter be, or constitute the site of the roadway, turn-outs, side tracks, depot grounds, and appurtenances, and all lands which now or may hereafter constitute and be a part of the road, and the rights of way thereof of the party of the first part from the town of Bremond, where it connects with the road of the Houston and Texas Central Railway company, to the depot grounds in the city of Waco, on the east side of the Brazos river, and thence as authorized by the charter of the party of the first part, and also the cross-ties and other superstructure work which has been or may hereafter be placed and built on the line of road aforesaid, and also all and singular the chartered rights, privileges, and franchises of every kind granted to the party of the first part by acts of the legislature of the state of Texas which are now possessed by the party of the first part, or to which they may hereafter become entitled under said acts and the laws of Texas relating to railroads. To have and to hold all and singular the said property, real and personal, with appurtenances and the chartered rights, privileges, and franchises aforesaid, hereby conveyed and intended to convey unto the parties of the second part, and the survivor of them, and their successors or successor, and their heirs and assigns forever as joint tenants, and not as tenants in common, in trust nevertheless upon the terms and conditions and with the powers herein expressed, to wit:

First. That the property herein conveyed shall remain in possession of the party of the first part for the purpose of completing the work to be done by it according to the agreement with the party of the third part, but that whenever and as soon as such work shall been done on any part of the road aforesaid the possession thereof shall pass to and be held by the party of the third part for the
59 purpose of completing said road, and thereafter shall be held by it as lessee according to the terms of said agreement.

Second. Should the party of the first part well and truly comply with the agreement aforesaid by performance of the work agreed to

be done by it, within the several periods prescribed in said agreement, and shall also punctually pay the bond aforesaid for six hundred thousand dollars on the first of January, eighteen hundred and seventy-three, then the trusts and powers hereby created shall cease and determine, and the property and chartered rights, etc., hereby conveyed shall be released and reconveyed to the party of the first part; and—

Third. Should the party of the first part well and truly comply with the agreement aforesaid, in respect to grading the road and supplying the cross-ties therein within the times therein specified, and the party of the third part should fail to comply with its agreement to complete said road and put the same in running order, so that locomotives and cars shall run thereon to Marlin and to Waco within the times required by said agreement, then this trust shall cease and determine, and the trustees shall release and reconvey all property and rights hereby vested in them to the party of the first part.

Fourth. Should the parties of the first and third parts mutually perform the work on said road as required by said agreement, and the same be completed and locomotives and cars run thereon to Waco by the first of October, eighteen hundred and seventy-three, or within the time of extension allowed by said agreement for contingencies and obstructions to the party of the third part, and thereafter the party of the first part shall fail to pay the said bond for six hundred thousand dollars, in gold coin, when it shall become due and payable, in either event as aforesaid, then the trustees, party of the second part, or either of them, shall proceed to execute this trust for satisfaction of said bond by sale of the property and rights hereby conveyed in manner hereinafter directed.

Sixth. In case of either default being made by the party of the first part, as before stated, then the trustees or either of them, or the survivor or successor of them, shall proceed to make sale in bulk of all the property, real and personal, and chartered rights and privileges hereby conveyed to and vested in them, by public auction to the highest bidder for cash, on such day, between the hours of ten o'clock a. m. and four o'clock p. m., as they or either of them may select, at the court-house door of Harris county, in the city of Houston, after having given notice of the time, terms and place of sale for twenty days in some newspaper published in said city of Houston, and upon payment of the price bid, either by the holder of said bond or other person, the trustees, or either of them, shall make title to the said purchaser by conveyance of all of said property, real and personal, chartered rights, privileges and franchises, under which conveyance, made in pursuance of this deed, the purchaser shall be entitled to the property and rights aforesaid and to the possession and control of the same in as full and complete a manner as the party of the first part had and possessed the same; and out of the proceeds of said sale the trustees, or either of them, shall first pay the expense of executing this trust, including reasonable compensa-

tion to them for their services in the sum of five hundred gold dollars; secondly, shall pay the said bond of six hundred thousand dollars, and interest thereon after maturity at twelve per cent. per annum, as far as the proceeds of the sale will pay the same; and, thirdly, should there be any surplus arising from the sale it shall be paid to the party of the first part, or their lawful agent.

Seventh. It is further covenanted and agreed by the parties that in case of the contingencies arising as aforesaid, whereby the trustees are authorized and required to execute this trust by sale as aforesaid, it shall not be necessary for the trustees to take possession of the property to be sold, but they, or either of them, may proceed to sell under this deed without regard to the possession, and then the title made by them, or either of them, in pursuance of the terms of this trust shall be complete and effectual to convey all the right and title of the parties hereto to the purchaser at such sale, and that such purchaser at such sale shall be entitled to the possession, and the parties hereto will and shall surrender the same to such purchaser.

Eighth. It is further considered and agreed that in case of the death of the trustees herein named as parties of the second part, or their inability to act from any cause, that the party of the third part may appoint other persons to be selected by their board of directors as successors to said trustees, such appointment to be in writing signed by the parties or secretary of said board, and that the successor so appointed, or either of them, shall be vested with and possessed of all the rights, trusts and powers hereby conveyed to the trustees named as parties of the second part, and the acts of such successors, or either of them, shall be as valid and binding as if done by the trustees herein named as aforesaid.

61 In witness whereof the party of the first part, acting by its president, John T. Flint, under authority of the stockholders and board of directors of said party, and the party of the third part, acting by its vice president, Abraham Groesbeeck, under authority of the board of directors of said party, do hereto sign their names, attested by the respective secretaries, and with the seal of said companies affixed; and the parties of the second part do also hereto sign their names in acceptance of the trusts conveyed to them, this sixth day of July, A. D. eighteen hundred and seventy-one.

(Signed) JOHN T. FLINT,
Pres. W. & N. W. R. R. Co.

Attest:
D. T. CHAMBERLIN, *Secretary.*

(Signed) A. GROESBEECK,
Vice-President Houston & Texas Central R'way Co.

Attest:
A. S. RICHARDSON,
Secretary H. & T. C. R'way Co.

Filed Nov. 8th, 1878.

Order of Court.—November 15th, A. D. 1878.

District court, McLennan county.

T. M. Shirley
vs.
Waco Tap R. R. Co.

And now at this term, and on this the 15th day of November, comes the plaintiff, T. M. Shirley, by his attorney, and by leave of the court withdraws the following portion of his amended original supplemental and amended petition, filed June 7th, A. D. 1878, and no further relies on the same in this cause, to wit: That after act of merger, on or about 24th day of June, A. D. 1874, the said H. & T. C. R. company ordered a meeting of what was called the directors of the W. & N. R. company, and after the persons calling themselves directors were assembled at Waco aforesaid, a majority of whom were directors of said H. & T. C. R. company, they granted and conveyed to said H. & T. C. R. company all the lands and land certificates to which the said W. & N. R. company was entitled as a donation from the state of Texas, amounting in the aggregate to five hundred thousand acres of land, which the said H. & T. C. R. company afterwards located on the unappropriated domain of the state of Texas, in what is known as Hardiman, Childress,
62 Cottle, Kent, Dallam, Tom Green, Howard, Mitchell, and other counties of the state of Texas, and well worth at that time one million of dollars, the consideration of which was pretended to be the two hundred thousand dollars claimed by the H. & T. C. R. company to be due it from the W. & N. R. company under said bond and deed in trust. Your petitioner avers and charges that all said acts of the pretended board of directors of said W. & N. R company are illegal, fraudulent, and void, because they had no authority to act; because said transfer was not authorized by the stockholders of said W. & N. R. company, called for that purpose; because said sale was in violation of the statute donating said lands to said W. & N. R. company; because if said pretended directors had any authority to act at all, it was but to close up the affairs of said W. & N. R. company, and distribute its remaining assets among its creditors; because it was no sale, there being but one party to the transaction, to wit, the said H. & T. C. R. company; because of the gross inadequacy of price pretended to be paid by said H. & T. C. R. company; because it was in fraud of your petitioner's rights, and has injured and damaged him; because it was *ultra vires*, the said H. & T. C. R. company having no authority to acquire lands beyond its needs for use as a railroad, depot grounds, etc., from any source except the state; five hundred thousand acres of land, situated as aforesaid, the donation of the state to said W. & N. R. company, of the value of one million dollars. And prays their withdrawal to be made of record.

63 *Judgment.*—Filed Nov. 25th, 1878.

Thomas M. Shirley
vs.
The Waco Tap R. R. Co. } No. 1779.

This cause being called for trial on the 11th day of November, A. D. 1878, came the parties, plaintiff and defendant, and announced respectively that they were ready for trial; and thereupon came a jury of good and lawful men, to wit, A. J. Ish and eleven others, who were elected, empannelled, and sworn according to law, and, after hearing the evidence adduced, the argument of counsel, and charge of court, retired to consider of their verdict, and afterwards, on the 25th day of November, A. D. 1878, returned in open court the following verdict:

"We, the jury, find for the plaintiff in the sum of eight thousand five hundred and nine dollars and forty-one cents, being principal and interest on reserved per cent. and work actually done; and for actual damages in the sum of fifty-four thousand and one dollars and nine cents; also, for exemplary damages, in the sum of thirty-seven thousand and five hundred dollars; and further find that the mortgage be foreclosed against the Waco and Northwestern Railroad company and the Houston and Texas Central Railroad company.

"A. J. ISH, *Foreman.*"

It is therefore ordered, considered, and adjudged and decreed by the court that the plaintiff, Thomas M. Shirley, do have and recover of and from the defendant, the Houston and Texas Central Railway company, the sum of eight thousand four hundred and nine dollars, with interest thereon at the rate of ten per cent. per annum from the 25th day of November, A. D. 1878. It is further considered and adjudged that said sum is an equitable mortgage on the railroad extending from the town of Bremond, in Robertson county, Texas, to the city of Waco, in said state of Texas, and upon the road-bed thereof and right of way, superstructure, rights and properties and franchises thereof, as the same existed and have accrued and vested under and by authority of the several charters granted by the legislature of the state of Texas, to wit, to the Waco Tap Railroad company, to the Waco and Northwestern Railroad company, and to the Houston and Texas Central Railway company, by an act merging the said Waco and Northwestern Railroad company in said last-named company, and is adjudged and decreed that said mortgage be foreclosed and that the sheriff of McLennan county for the time being be

64 and is hereby appointed a commissioner, and as such is authorized and empowered to enter upon and seize said above-named property as a whole, and after advertising the same in some daily newspaper published in McLennan county, Texas, for thirty days, he shall sell the same as under execution to the highest bidder for cash at the court-house door of said McLennan county, and shall make report of his action hereunder to this court at the next term

succeeding such sale. It is further considered and adjudged by the court that the said plaintiff, Thomas M. Shirley, to have and recover of and from the said Houston and Texas Central Railway company, into which said Waco and Northwestern Railroad company has been merged, the further sum of ninety-one thousand four hundred and ninety-one and 50-100 dollars, with interest at eight per cent. per annum from November 25th, 1878, for which execution may issue, and all his costs in this behalf expended, for which execution may issue; and that execution may issue against said defendant, the Houston and Texas Central Railway company, for all other costs herein accrued in the name of the plaintiff for the use of the officers of the court and other persons entitled to the same, to which judgment of the court the defendants except, and the clerk will issue a commission to the sheriff in accordance herewith.

Motion for a new trial.—Filed November 27th, A. D. 1878.

In the district court of McLennan county.

Thomas M. Shirley
vs.
The Waco Tap Railroad Company and the Houston and Texas Central Railway Company. } No. 1779.

Now comes the defendant, the Houston and Texas Central Railway company, and moves the court to grant a new trial in this cause for the following reasons, to wit:

1st. Because the court erred in the 21st subdivision or section of the charge, wherein the jury were instructed that by the act of the legislature merging the Waco and Northwestern Railroad company in the Houston and Texas Central Railway company, and the
65 acceptance of said act and its benefits by said last named company, the Houston and Texas Central Railway company became liable for all obligations of the Waco Tap and its nominal successor, the Waco and Northwestern Railroad company, whether in debt or damages,

2d. Because the court erred in refusing to give the three several charges prayed for by this defendant, to wit:

1. That the deed of conveyance by P. W. Gray and Benj. A. Botts, trustees, of date March 31st, 1873, to the Houston and Texas Central Railway company vested the title in said railway company to all the following named property and rights before that date belonging to the Waco and Northwestern Railroad company, viz: All and singular the several tracts and parcels of land which then were or might be or hereafter constitute the site of the roadway, turn-outs, side tracks, depot grounds and appurtenances, and all lands which now or may hereafter constitute and be a part of the road and rights of way thereof of the said Waco and Northwestern Railroad company from the town of Bremond, where it connects with the road of the Houston and Texas Central Railway company, to the depot

grounds in the city of Waco, on the east side of the Brazos river, and thence as authorized by the charter of the Waco and Northwestern Railroad company; and also the cross-ties and other superstructure work which has been or may hereafter be placed and built on the line of road aforesaid; and also all and singular the chartered rights, franchises, and privileges of every kind granted to the Waco and Northwestern Railroad company by acts of the legislature of the state of Texas, and to which it might hereafter become entitled by virtue of said acts, or any legislative acts relating to railroads; and the Houston and Texas Central Railway company took and holds the same free from all claims for damages made by the plaintiff in this suit.

2. That the act of the legislature of the state of Texas, approved May 24th, 1873, entitled "An act to provide for the merger of the Waco and Northwestern Railroad company, with its properties, rights, privileges, and franchises, in the Houston and Texas Central Railway company, does not make said last mentioned railway company liable to plaintiff's claim for damages, nor for any amount except such as has been shown plaintiff held a lien by reason of his contract with the Waco Tap Railroad company, as explained in sections No. 7 and No. 18 of the official charge.

3. That the Houston and Texas Central Railway company pleads the statute of limitation of two years in bar of plaintiff's action for damages against this defendant. Upon this, you are charged that the plaintiff's right of action against the Houston and Texas Central Railway company accrued on the
66 date of the legislative act of merger, which was on the 26th day of May, 1873, and as the evidence before you, of file in this cause and uncontradicted, shows that this suit, as against said Houston and Texas Central Railway Company, was not instituted until the 24th day of April, 1876, more than two years from said act of merger, you will find for said defendant on all claims by plaintiff, save and except the amount secured by lien.

3d. Because the court erred in overruling the defendant's motion to suppress the depositions of A. B. Brown and R. P. Boyce, based upon grounds set forth in bill of exceptions.

4th. Because the verdict of the jury is contrary to the law and evidence in this:

First: The actual damages assessed are excessive.

Second: The exemplary damages are unwarranted, both by the law and the evidence.

Third: The amount of exemplary damages *ex facie* show that the jury were actuated by passion and prejudice.

Fourth: The exemplary damages awarded by the jury are grossly excessive.

5th. Because the 20th section of the charge and the 21st section thereof are incongruous and contradictory—the one inconsistent with the other.

6th. Because of error on the face of the record in rendering any judgment for money against this defendant, instead of a judgment *in rem* to subject assets specially described and set forth.

7th. Because the court erred in charging the jury that there is no evidence tending to show that the contract between plaintiff and defendant, Waco Tap Railroad company, was procured by any fraudulent representations on plaintiff's part, (sec. 6 of the charge.)

HERRING, ANDERSON & KELLY, and
GEORGE GOLDTHWAITE,
For defendant, H. & T. C. Railway Co.

Filed Nov. 27th, A. D. 1878.

67 *Appeal Bond.*—Filed and approved January 6th, 1879.

THE STATE OF TEXAS, }
McLennan county. }

In district court of McLennan county.

Thomas M. Shirley
vs.
The Waco Tap Railroad Co. and The Houston and Texas Central Railway Co. } No. 1779.

Whereas, at a term of the district court in and for the county of McLennan, begun and holden on the 4th day of November, A. D. 1878, in a certain suit pending in said court, wherein Thomas M. Shirley is plaintiff, and the Waco Tap Railroad Company and the Houston and Texas Central Railway Company are defendants, and numbered on the docket of court as No. 1779, the plaintiff, Thomas M. Shirley, recovered a judgment against the defendant, the Houston and Texas Central Railway Company, in words and figures following, to wit:

68 Thomas M. Shirley
vs.
The Waco Tap R. R. Co. } No. 1779.

This cause being called for trial on the 11th day of November, A. D. 1878, came the parties plaintiff and defendant and announced respectively that they were ready for trial; and thereupon came a jury of good and lawful men, to wit, A. J. Ish and eleven others, who were elected, impannelled, and sworn according to law, and after hearing the evidence adduced, the argument of counsel, and charge of the court, retired to consider of their verdict, and afterwards, on the 25th day day of November, A. D. 1878, returned in open court the following verdict:

"We the jury find for the plaintiff in the sum of eight thousand five hundred and nine dollars and forty-one cents, being principal

and interest on reserved per cent. and work actually done; and for actual damages in the sum of fifty-four thousand and one dollars and nine cents; also for exemplary damages in the sum of thirty-seven thousand and five hundred dollars; and further find that the mortgage be foreclosed against the Waco and Northwestern Railroad company and the Houston and Texas Central Raliway company.

A. J. ISH, *Foreman.*

Is is therefore ordered, considered, and adjudged and decreed by the court that the plaintiff, Thomas M. Shirley, do have and recover from the defendant, the Houston and Texas Central Railway company, the sum of eight thousand four hundred and nine dollars, with interest thereon at the rate of ten per cent. per annum from the 25th day of November, A. D. 1878. It is further considered and adjudged that the said sum is an equitable mortgage on the railroad extending from the town of Bremond, in Robertson county, Texas, to the city of Waco, in said state of Texas, and upon the road-bed thereof and right of way, superstructure, rights, and properties and franchises thereof as the same existed and have accrued and vested under and by authority of the several charters granted by the legislature of the state of Texas, to wit: To the Waco Tap Railroad company, to the Waco and Northwestern Railroad company, and to the Houston and Texas Central Railway company, by an act merging the said Waco and Northwestern Railroad company in said last-named company; and it is adjudged and decreed that the said mortgage be foreclosed, and that the sheriff of McLennan county, for the time being, be and is hereby appointed a commissioner and as such is authorized and empowered to enter upon and seize said above-named property as a whole, and after advertising the same in some daily paper published in McLennan county, Texas, for thirty days, he shall sell
69 the same as under execution to the highest bidder for cash, at the court-house door of said McLennan county, and shall make report of his action hereunder to this court at the next term succeeding such sale. It is further considered and adjudged by the court, that the said plaintiff, Thomas M. Shirley, do have and recover of and from the said Houston and Texas Central Railway Company, into which the Waco and Northwestern Railroad has been merged, the further sum of ninety-one thousand four hundred and twenty-one 50-100 dollars, with interest at eight per cent. per annum from November 25th, 1878, for which execution may issue, and all his costs in this behalf expended for which execution may issue; and that execution may issue against said defendant, the Houston and Texas Central Railway Company for all other costs herein accrued in the name of plaintiff for the use of the officers of the court and other persons entitled to the same, to which judgment of the court the defendants except, and the clerk will issue a commission to the sheriff in accordance herewith, from

which judgment the Houston and Texas Central Railway company has appealed to our supreme court.

Now, therefore, we, the Houston and Texas Central Railway company, as principal, and Thomas W. House, B. A. Shepherd and C. A. Whitney, as sureties, acknowledge ourselves indebted and bound to pay Thomas M. Shirley the sum of two hundred and one thousand dollars, conditioned that the said Houston and Texas Central Railway company shall prosecute its appeal with effect, and perform the sentence, judgment, or decree of the supreme court, in case the decision of said court shall be against the appellant.

Witness our hands and seals, this the 31st day of December, A. D. 1878.

[L. S.] HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,
Attest: By G. JORDAN, *Vice-President.*
A. S. RICHARDSON, *Secretary.*
CHARLES A. WHITNEY.
T. W. HOUSE.
B. A. SHEPHERD.

Filed and approved January 6th, A. D. 1879.

70 District court, McLennan county, November term 1881.

T. M. Shirley
vs.
Waco Tap R. R. Company et al. } No. 1779.

And now at this term comes the plaintiff, and, after leave of court, amends his consolidated petition filed June 7, 1878, the original petition in this cause having been filed herein July 16, 1870, and says:

Your petitioner, T. M. Shirley, a citizen of Harris county, state of Texas, complains of the Waco Tap Railroad Company, a corporation chartered by the legislature of the state of Texas, by an act entitled "An act to incorporate the Waco Tap Railroad Company, approved Nov. 5, 1866, and having its principal office at Waco, McLennan county, Texas, for this:

That on or about the 29th day of July, 1869, he entered into a contract with said Waco Tap Railroad Company, (hereinafter designated by the letters W. T. R. C., being the initial letters of the name of the said Waco Tap Railroad Company,) which was then reduced to writing and signed by himself and J. W. Speight, as president of said company, for said W. T. R. C., and which said contract, your petitioner is informed and believes, was afterwards approved and countersigned by the board of directors of said W. T R. C., and that by a resolution of said board of directors said contract was approved and accepted by them, a substantial copy of which contract is hereto attached marked A and made a part of this petition.

In consideration of the payments, rights, and profits as specified

in said contract, your petitioner agreed and bound himself to form, prepare, finish, and execute in a thorough and workmanlike manner the clearing, grubbing, excavating, embankment, trestling, surfacing, tracklaying, and to furnish the cross-ties for the road of the said W. T. R. C. entire, from the junction of said road with the Houston and Texas Central Railroad Company's road to the town of Waco, a distance of fifty miles, both points being in the state of Texas, said junction being at the town of Bremond, Robertson conty, and Waco, McLennan county.

By said contract your petitioner bound himself to begin work on said road on or before the first day of September, 1869, which time was extended for twenty days afterwards at request of your petitioner, and to complete and finish said work on or before September, 1871, making in the aggregate two years of time within which to fulfill the terms of said contract. And it was further agreed that said work should be done according to certain specifications, which were in writing and attached to said contract, and such additions or alterations of the work as the engineer of said company might consider expedient were to be made upon the terms of the original contract.

Your petitioner bound himself in said contract with said Waco Tap Railroad company to pay all damages that might accrue by a failure to complete the work in the time specified; and also, after proper notice to increase his working force, to pay damages for such failure; and further, said Waco Tap Railroad company might retain fifteen per cent. out of each monthly payment to your petitioner under said contract; and if the work was not performed to the satisfaction of the engineer of said W. T. R. company, then the whole of each monthly payment should be held by said W. T. R. company until said work was properly done; and your petitioner bound himself in a bond, with two sureties, approved by the said president, in the penal sum of one hundred and fifty thousand dollars, for the faithful performance of the entire contract.

That by said contract said W. T. R. company was bound and agreed to pay to him, in American coin, meaning the legal coined currency or money of the United States, at the office of the said W. T. R. company in Waco, Texas, for said work done under said contract, at the rate of twenty-five cents per cubic yard for excavating and embankment in common clay or earth; for hard pan or such other material not herein specified as cannot be removed in greater quantities than six cubic yards per day by an experienced, first-class railroad laborer, forty cents per cubic yard; excavating in loose rock, seventy-five cents per cubic yard; excavating in solid rock, one dollar and ten cents per cubic yard; grubbing, per chain of one hundred feet, five dollars; clearing two hundred feet wide, three hundred and fifty dollars per mile; cross-ties, forty-five cents each; trestling, six dollars and fifty cents per lineal foot; surfacing, one hundred and fifty dollars per mile; track laying, five hundred and fifty dollars per mile.

It was further agreed in said contract that the said W. T. R.

company should pay your petitioner each month, during the progress of the work, such an amount as the engineer should estimate to be a fair average value of the work done each month, agreeable to said contract, and of that amount so estimated the said W. T. R. company agreed to pay your petitioner eighty-five per cent., and when the whole work, as contracted for, should have been accepted by the engineer and completed agreeable to said contract, then the whole should be paid to your petitioner, including the fifteen per cent. that had been reserved.

It was further agreed in said contract that for the purpose of securing to your petitioner the fifteen per cent. which was to be retained by said W. T. R. company out of each monthly estimate, as well as any other sum that might be due and unpaid by said W. T. R. company, that said W. T. R. company would execute and deliver to your petitioner a proper mortgage in good and sufficient terms upon the road-bed, superstructure, rolling-stock, land, franchises, and other property; the said mortgage to be duly executed as soon as the reserved fifteen per cent. on the work done should amount to the sum of twenty thousand dollars, which mortgage was to become due and payable upon the final completion of the work; and at the end of each and every month said W. T. R. company was to make and deliver its promissory note in writing, to bear ten per cent. interest, for whatever sum may be due upon each monthly estimate, as well as also to include the reserved fifteen per cent.

71 It was further agreed by the parties in said contract that your petitioner, with the approval of the president of said W. T. R. C., might purchase iron, rolling-stock, (meaning locomotives and cars,) and other property necessary to run said W. T. R. Co.'s road, and put the same in operation, if your petitioner saw fit to do so; and should have the privilege of operating the same and be entitled to all the profits, without account to the said W. T. R. C., arising from said business of said road, until all claims, debts, and just demands of whatever kind of your petitioner be fully satisfied, paid, and discharged; all of which your petitioner had intended to do; and said W. T. R. company agreed to make, execute, and deliver to your petitioner the said W. T. R. company's promissory note or notes, in writing, for said iron, rolling-stock, etc., as aforesaid, and to secure by mortgage in like manner as the other indebtedness to your petitioner as aforesaid.

It was further agreed by said W. T. R. company, and it obligated itself, that when the road was completed and finished in sections of ten miles to provide iron, an engine, and necessary cars to run the road for that distance, and to haul supplies, distribute iron, ties, etc., for your petitioner; and it was further agreed that your petitioner should have the right to construct the bridge for said W. T. R. company across the Brazos river upon such terms as might thereafter be agreed upon between the parties to said contract, and such agreement when made should be a part of and subject to all

the terms and securities of the original contract, as far as applicable.

It was further agreed, and the said W. T. R. C, obligated itself in said contract, that if the work of your petitioner should be suspended by said W. T. R. company, or this contract plainly violated on the part of said W. T. R. company, then in either or both such cases all sums due the contractor, as well as the reserved fifteen per cent. retained, should become due and payable, and the aforesaid mortgage should be foreclosed at once, and it was agreed that the mortgage should be so drawn that in the event of such contingency it might be foreclosed without delay, or involving your petitioner in litigation or expense to obtain his just demands.

It was further agreed, and your petitioner obligated himself to said W. T. R. company, that when said W. T. R. company had paid or secured to your petitioner, under said contract, the sum of one hundred and fifty thousand dollars, then your petitioner would advance to said W. T. R. company twenty-five thousand dollars, or would perform work under said contract to that amount, and when said W. T. R. company should have paid or secured the further sum of fifty thousand dollars, then your petitioner bound himself to advance the further sum of twenty-five thousand dollars in work as aforesaid; and when the said W. T. R. company should have paid or secured to your petitioner to within one hundred thousand dollars of whatever sum might be required to complete the said W. T. R. company's road, then your petitioner obligated himself to complete the entire road as contemplated and specified in said contract, and was to run, control, and operate said road after being so completed, and be entitled to all profits from the same as aforesaid, all which your petitioner was ready and intended to do. And said W. R. T. company bound itself to make, execute, and deliver to your petitioner their good and sufficient mortgage, with power of sale, to secure said advancements in the same manner and terms as the mortgage already provided for in said contract.

It was further agreed that the said W. T. R. company was bound that its president and directors should do all in their power to aid your petitioner in obtaining labor, supplies, timber, etc., and to lend their cordial support and influence to facilitate the contractor in every way in the prosecution of the work, and said W. T. R. company was bound so that in case your petitioner should refuse or neglect to perform all the covenants enumerated in said contract, that, upon said W. T. R. company's engineer certifying such fact to the president of said W. T. R. company, the president might, at his option, after careful investigation and due notice in writing to your petitioner, and after his refusal to remedy the evils complained of, declare this contract null and void.

Your petitioner avers and charges that when this contract was reduced to writing certain specifications were also reduced to writing and signed aforesaid. Said contract and specifications were not signed in duplicate, but the said W. T. R. company kept the original

and gave your petitioner merely a copy of said contract and specifications, which is incorrect, and your petitioner avers that said original contract and specifications, as signed by your petitioner, is now in the possession of said W. T. R. company and notice is now given to produce the same on the trial of this cause, or secondary evidence of its contents will be introduced.

Your petitioner avers that he began work upon said road under the terms and agreement of said contract during the month of September, 1869; that he had on said road a sufficient force of hands, equipments, and supplies, and that he kept such force at work, faithfully fulfilling all the terms and requirements of said contract, and was able and fully intended to do so until said road was fully completed; and not having received notice or intimation of dissatisfaction on the part of the said W. T. R. company, he believed said W. T. R. company were fully satisfied with his work and manner of complying with said contract.

Your petitioner avers and charges that on or about the 26th day of March, 1870, your petitioner received a letter through the post-office at Houston, Texas, dated Waco, March 23, 1870, and signed E. L. Heriot, chief engineer, which said letter is hereto attached, marked "B," and made a part of this petition, which said letter was accompanied by a copy of a resolution passed at Waco, March 18, 1870, by the board of directors of said W. T. R. company, and an order from John T. Flint, the president of said W. T. R. company, to E. L. Heriot, chief engineer of said W. T. R. company, certifying that the copy was correct and to be observed by said engineer, a copy of which said resolution is hereto attached, marked "C," and made a part hereof. Said resolution was in effect an order that your petitioner put one hundred hands at work on said road within fifteen days from the date of said resolution, and to keep that number constantly at work; and a failure to do so on the part of your petitioner would be considered a violation of the said contract.

72 Your petitioner avers that on the 2d day of April, 1870, he received a telegram from John T. Flint, president of said W. T. R. C., dated 2d day of April, 1870, which telegram is hereto attached, marked "D," and made a part hereof, which said telegram was signed by said John T. Flint as president of said W. T. R. C., and in effect declared the entire contract between your petitioner and said W. T. R C. null and void, and declared that your petitioner would be no longer recognized as a contractor on said road by said W. T. R. C.

Your petitioner avers that on or about the 6th day of April, 1870, after the receipt of said letter, telegram, and resolution as aforesaid, at Calvert, Texas, at which time and place your petitioner met said John T. Flint, who was then president of said W. T. R. C., and acting as such president, and during which interview your petitioner complained to said president that all said acts of the board of directors of said W. T. R. C., himself as president, and said E. L.

Heriot as chief engineer of said W. T. R. C., were illegal and void, and doing a great wrong and injury to your petitioner; and at the same time and place your petitioner demanded of said president to point out wherein said contract had been violated by your petitioner, and if it had been violated in letter or spirit to then and there proceed to make complaint through the proper officer, and to follow out the provisions of said contract. And your petitioner offered to execute a new bond in a greater penalty if said president required it, but said president answered nothing, and left your petitioner without showing any violation of said contract, and without giving notice as required by said contract.

And further, said president went immediately on the line of the road of said W. T. R. company, and to the employees of your petitioner, and notified all persons on said road that your petitioner would be no longer recognized as contractor, and that all work done on said road thereafter was in the direct employ of said W. T. R. company, and thereby forcibly, illegally, wrongfully, and maliciously took possession of your petitioner's said work and said line of road from Bremond, in Robertson county, Texas, to Waco, in McLennan county, Texas, and all the premises, surveys, and lines as specified and understood in said contract and specifications thereto attached; and said president then forcibly and maliciously, and still does to this day, prevent your petitioner from carrying out the letter, spirit, or terms of said contract; and the said W. T. R. company ratified all the said acts of its president, John T. Flint, so done and performed.

Your petitioner avers that at the time of said forcible entire of said president he had contracts perfected and in negotiation for a larger number of workmen to go on the line of said road than was called for by said resolution, and that he had supplies purchased to subsist said workmen for two months, a part of which was then at Calvert, a short distance from his work, the then terminus of the Houston and Texas Central Railway; all which he notified said president and said chief engineer, and then and there, at said interview as aforesaid, notified said president that he was able, prepared, and expected to go on to complete said contract.

Your petitioner avers and charges that he has been greatly wronged and damaged by the said illegal, forcible, and malicious acts of said W. T. R. company, through its president and board of directors, in this:

That there is due and owing to your petitioner from said W. T. R. company the reserved fifteen per cent. which said W. T. R. company retained out of each monthly payment, on such monthly payments as said W. T. R. company made to your petitioner, amounting in aggregate to about three thousand dollars and interest, and there is due and owing and unpaid to your petitioner from said W. T. R. company the sum of ten thousand dollars, with interest, for work and labor done and performed at the instance, request, and for the benefit of said W. T. R. company under said contract,

all which seems your petitioner has often requested said W. T. R. company to pay to him, but said W. T. R. company has wholly failed, refused, and neglected to pay the same, or any part thereof, to the damage of your petitioner twenty thousand dollars.

Your petitioner further avers that he has been greatly damaged in this: By said forcible, violent, and malicious breach of said contract, that he is prevented from completing the same or fulfilling his obligation thereunder, thereby depriving him of all profits, advantages, and benefits that would have accrued to him thereunder, to wit, the profits upon the excavating, in common earth or clay, which would have been about twelve and one-half cents per yard; the profits for excavating in hard pan, as specified in said contract, which would have been about twenty cents per yard; the profits in excavating solid rock, at about fifty cents per yard; the profits in grubbing, which would have been about two dollars and fifty cents per each hundred feet; the profits in clearing, which would have been about two hundred dollars per mile; the profits on cross-ties, which would have been about twenty-five cents each; the profits on surfacing, which would have been seventy-five dollars per mile; the profits on laying the track, which would have been about three hundred dollars per mile; the profits on trestling, which would have been about two dollars and a half per lineal foot; said road of W. T. R. company, as surveyed at the date of said contract, and as understood and agreed under said contract, being about fifty miles in length, to extend from Bremond, Robertson county, to Waco, McLennan county, both in Texas, all which said profits would have accrued to your petitioner, and were in contemplation and understood by the parties when said contract was entered into, through the payments to be made by said W. T. R. company, and were to be paid in the legal coined money of the U. S. of America.

And further, that he has been damaged in this: The loss of the profits to be made by running said road of the W. T. R. company after said road was being constructed as specified in said contract; and the profits to be made in building the bridge across the Brazos river for the said W. T. R. company as specified in said contract; all which said profits in the construction of said road, with the profits of running the same for the use of the public, and building said railroad bridge, and including what is due and owing your petitioner as aforesaid, would amount in the aggregate to one hundred and fifty thousand dollars of the legal coined money of the United States of America.

73 All which profits became due your petitioner, and said W. T. R. C. was justly indebted to and bound to pay your petitioner said sums on the day and date of the said forcible, illegal and malicious breach of said contract and by reason of said breach; but well knowing said liability and indebtedness, said W. T. R. C. has wholly failed and refused to pay the same or any part thereof, though often thereunto requested.

Your petitioner further avers and charges that on or about the 29th day of July, 1869, he made and entered into a contract in writing with the said W. T. R. C. to construct, build, complete and equip, under certain conditions, the entire road of said W. T. R. C. to extend from Bremond, Robertson county, Texas, to Waco, McLennan county, Texas, a distance of about fifty miles, which said contract is hereto attached, marked exhibit "A," and the terms, conditions, payments, and obligations as more specifically set out in the preceding portion of this petition are here adopted and referred to to avoid repetition.

That on or about Sept., 1869, your petitioner in good faith entered into the discharge of the obligations of said contract, and to that end and purpose he expended large sums of money and incurred great liabilities in procuring the necessary commissary and working outfit in provisions, supplies, horses, mules, wagons, scrapers, wheelbarrows, etc., with which to carry on said work as agreed in said contract; that he employed a large number of laborers at great expense to him; had let sub-contracts for work on said road, and had a full and active corps of laborers and subcontractors at work on the line of said road under said contract, and had faithfully performed and discharged all his agreements and promises under said contract for a period of about six months, and was able, competent, and prepared, and fully intended to carry out said contract to its entire completion, and was at all times ready and willing to accede to any reasonable request of the said W. T. R. company about said work on its said road under said contract, and your petitioner had no notice of dissatisfaction on the part of said W. T. R. company, but fully relied upon the good faith and fairness of said W. T. R. company in the proper discharge of its obligations under said contract.

But said W. T. R. company, acting in bad faith, and wilfully and maliciously intending to injure and wrong your petitioner, and tortuously abrogate said contract, did, through its board of directors, at Waco, McLennan county, Texas, its principal office, pass and adopt, on the 18th day of March, 1870, in tort*ous* violation of said contract in letter and spirit, a resolution in substance that the engineer serve a notice on your petitioner to put one hundred working hands upon the work under said contract within fifteen days from said 18th day of March, 1870, and that he must keep that many hands constantly employed, and that a default to do so would be considered a violation of said contract; and the president and engineer ordered to hold your petitioner to a rigid performance of the contract, a copy of which resolution is hereto attached, marked "C"; the said W. T. R. company well knowing that at the date of said resolution it had not sufficient funds to pay him his estimates for the work done by the number of hands that he then had at work, and that in fact the said W. T. R. company did not then have, nor would not have, sufficient funds to pay his March estimates when due.

That in pursuance of the original purpose to abrogate said contract, the W. T. R. company caused said resolution to be immediately (and before served upon your petitioner) published in the newspapers at Waco and Galveston, Texas, well knowing it would injure him in the prosecution of his work under said contract. And further, in pursuance of said original design, John T. Flint as president of said road, on or about the 2nd day of April, 1870, acting in his official capacity, maliciously intending to wrong and injure your petitioner, caused to be published in the newspapers of the state of Texas having a circulation in Galveston, Houston, Waco, and the country on the line of the road of said W. T. R. company, which under said contract your petitioner had contracted to construct, a notice or advertisement that your petitioner had virtually abandoned his work on the road of the W. T. R. company and violated in other respects the spirit of his contract, and the same was declared null and void, and that your petitioner would be no longer recognized as a contractor, and hands and contractors were wanted; a copy of which advertisement is hereto attached, marked "E," and all which acts of the said president the said W. T. R. company afterward fully ratified.

That said notice or advertisement was false in fact and intent, which said W. T. R. company well knew, and was a plain violation of said contract. And said publication or advertisement, together with the publication of said resolution as aforesaid, were at once circulated among your petitioner's workmen and his employees then on the line of said road, and had the effect to greatly injure and damage your petitioner, as said W. T. R. company well knew and intended, in breaking up contracts your petitioner had made for labor, and caused great dissatisfaction among the workmen and employees then on the line of the road. And as your petitioner was temporarily absent from the line of the road at the time, attending upon his sick wife at Houston, they believed said publications to be true, and quit their work and contract, and disorganized his operations under said contract, all of which said W. T. R. company intended to do.

And further, that about the 29th day of March, 1870, the said W. T. R. company, through its officers and employees, combined and confederated with one John Byrnes, and instigated the said Byrnes, by promise of future rewards, to falsely set up a claim against your petitioner for labor and money advanced to your petitioner, and caused the said Byrnes to sue out of the district court of Falls county, Texas, a writ of attachment for said amount so falsely and fraudulently claimed by said Byrnes; and, in the absence aforesaid of your petitioner, had the same levied by the sheriff of said Falls county upon a part of your petitioner's commissary and working outfit, being then on the line of said road in petitioner's possession, and consisted of mules, wagons, tents, plows, scrapers, oxen, dry goods, clothing, etc., amounting in value to about two thousand dollars, intending thereby to crip-

ple. harrass and damage your petitioner, and said levy
74 did harrass, cripple, and damage your petitioner, and the W. T. R. company intended, and did use, said attachment and levy by said Byrnes as a reason and excuse for declaring said contract at an end, though well knowing that, beside and without regard to the property so levied on, your petitioner had at the time of said levy, on the line of said road, plenty of supplies and working outfit fully sufficient to keep up the work under his said contract.

Your petitioner avers that, although greatly damaging and crippling him in his operations under his said contract, he had sufficient material with which to continue his contract after said levy of the attachment as aforesaid.

That because of said unjust and illegal attachment and levy he was obliged to employ attorneys at great expense to defend said attachment suit, and forced to make various bonds in the course of said suit, and to give security to his bondsman, and otherwise greatly damaged, annoyed and harrassed by reason of said suit, so instigated, procured, and conducted by the said W. T. R. company.

Your petitioner avers that he owed Byrnes nothing, and that Byrnes had no just cause of action against him, and that afterwards said W. T. R. company did reward said Byrnes, and that the said W. T. R. company afterwards ratified all the acts of John T. Flint, its president, and the said acts of its officers and employees in the Byrnes attachment.

And further, that on or about the 1st of April, 1870, John T. Flint, who was then president of said W. T. R. company, and acting in his official capacity, and in carrying out the aforesaid original intention of said W. T. R. company, did maliciously and tortously enter and take possession for said W. T. R. company of the entire line of said W. T. R. company's road from Bremond to Waco as aforesaid, and did then and there oppressively, tortously, and with force and arms eject, dispossess, and evict your petitioner from the premises, surveys, and lines as specified in said contract, and as such president, and for said W. T. R. company, took forcible and illegal possession of said works, lines and surveys and converted them to the use and benefit of said W. T. R. company, upon which your petitioner then had a large force of hands at work under his said contract, and notified all persons that said W. T. R. company had declared said contract null and void, and ordered all laborers and sub-contractors under your petitioner to look to said W. T. R. company for their pay in future; all which said acts were afterwards ratified by said W. T. R. company.

Your petitioner avers that by said fraudulent, forcible, oppressive, malicious, and tortous acts of said W. T. R. company that he has been greatly damaged, defrauded, and wronged in this:

1st. He has been damaged twenty-five thousand dollars in his character, reputation, and standing among business men by the two aforesaid publications, they having been made publicly through

the newspapers and otherwise, and had great publicity at Galveston, Houston, Calvert, and Waco, Texas, among friends and strangers, and said publications very injuriously effected large commercial transactions and his financial credit at all these places where he had great interests at stake. And it was intended by said W. T. R. company and it would have caused your petitioner to make forfeiture of his contract or put him to great additional expense and loss to carry it on, and that after said publications he was refused credit at these several places, and he was looked upon as a defaulter.

2d. He has been damaged twenty-five thousand dollars by reason of said suit of John Byrnes, instigated, aided, and assisted as Byrnes was in said suit by said W. T. R. company, by loss in the property levied on and turned over to said W. T. R. company, damage to character and reputation, great expense in defending said unjust attachment, loss of time, and annoyance and harrassment of said suit at law.

3d. He has been damaged in the further sum of fifty thousand dollars in this: The tortous, forcible and illegal eviction from and tortous conversion of the entire line, survey, and right of way of the road of the said W. T. R. company by said W. T R. company, of which your petitioner was then in lawful actual possession and use under his said contract, and thereby maliciously and tortously defrauding and forcibly depriving him of all the rights, benefits and advantages then accruing and to accrue by virtue of his said possession and use.

4th. He has been damaged in the full sum of twenty-five thousand dollars in this: the said illegal, malicious, and tortous acts of said W. T. R. company has forced your petitioner to the harrassing and expensive recourse of a law suit with it to recover his just compensation, and in and about said suit he has paid out and become obligated to pay large sums of money for attorney's fees, costs of courts, and unusual and burdensome expenses attendant upon said suit at law.

5th. He has been damaged in the further sum of twenty-five thousand dollars in this: all said acts of said W. T. R. company caused him great loss in the remainder of his outfit, commissary and sutler stores, not levied on by the Byrnes attachment, and rendered useless for the purpose intended for them by your petitioner, because of his said eviction from the line of the road of said W. T. R. company, and they had to be disposed of at a great loss; and in loss of time, mental distress, the injury to his business of contractor, his reputation and standing in the community where he lived.

All which said damages, wrongs, and injuries, in their several sums amount to the further sum of one hundred and fifty thousand dollars in the coined money of the United States.

Your petitioner further avers and charges that it was understood and agreed by said W. T. R. company, and so specified in said contract, that all sums of money due from said W. T. R. company to

your petitioner, should constitute a lien and mortgage upon all the road-bed, superstructure, lands, franchise, taxes, and property of said W. T. R. company until paid, and it was agreed to execute notes and mortgages for the same, but said W. T. R. company has failed and refused to execute said notes and mortgages. It was further understood and agréed, as a part of the terms, and so specified in said contract, that if said W. T. R. company violated the said contract and should prevent your petitioner from carrying
75 ing out the same, that then all damages, losses, and injuries should become, as well, an incumbrance and lien upon the road, roadbed, etc., as aforesaid, to the postponement of all other liens and mortgages upon said road, land, etc., of the said W. T. R. company, and your petitioner avers that said sums of money are due and unpaid from said W. T. R. company, and that the said W. T. R. company has grossly, fraudulently, and oppressively violated the letter, spirit and intent of said contract, and has illegally and tortuously prevented your petitioner from carrying out and completing the same; therefore, all said sums of money, and all said damages, injuries, and losses of your petitioner constitute a lien and incumbrance upon said road, road-bed, land, etc., of the said W. T. R. company until discharged and liquidated.

John T. Flint is president, and D. T. Chamberlin secretary and treasurer of said W. T. R. company, and its principal office is at Waco, McLennan county, Texas.

Your petitioner is informed, and believes, and so charges, that the legislature of the state of Texas, now in session, has, or will, change the name or style of the said W. T. R. company and otherwise amend its charter.

Your petitioner prays for citation in the terms of the law to the said W. T. R. company, and that on final hearing hereof he may have his judgment against W. T. R. company for his said sums of money due and unpaid, all his claims, demands, damages, profits, and losses, as aforesaid, together with his interest and costs; that said contract be, and all sums for work and labor performed and unpaid your petitioner, all sums of money retained by said W. T. R. company due your petitioner, as well, adjudged a lien and incumbrance upon the road, road-bed, property, etc., of said W. T. R. company, as, also, all your petitioner's damages, profits and losses, as aforesaid, whether held under the name of the Waco Tap Railroad company, or any other, or by any grant, gift, or right whatsoever, and that your petitioner have his decree of foreclosure; if not entitled to that, then that he may have his execution, and for such other orders and relief as he may be entitled to in law or equity.

Said W. T. R. company is notified to produce on the trial hereof the originals of the exhibits of this petition, or evidence of their contents will be introduced.

Original Amendment.—Filed December, 28, 1877.

Your petitioner avers that after the said breach of his contract by the said W. T. R. company, it procured, and the legislature of the state of Texas passed, an act entitled "An act to amend sections one (1), two (2), three (3), five (5), six (6), eleven (11), twelve (12), thirteen (13), fifteen (15), nineteen (19), and twenty (20), of an act to incorporate the Waco Tap Railroad company," approved August 6, 1870, by which the name of the W. T. R. company was changed to "Waco and Northwestern Railroad company," and otherwise materially changing its charter, and the defendant heretofore designated as W. T. R. company will hereinafter be designated by the letters W. & N. R. company.

That immediately after the breach of said contract, as heretofore set out, said W. & N. R. company took possession of the entire line of said road from Bremond, in Robertson county, to Waco, McLennan county, Texas, and at once assumed and exercised complete control of the entire said line, survey, and right of way, to the great loss and damage of your petitioner, as hereinbefore set out.

And said W. & N. R. company so continued to possess and control the same, after the filing of the original petition in this cause, and until about the month of June, 1871, when said W. & N. R. company, intending to hinder and delay your petitioner, as a creditor, in the recovery of his losses, profits, and damages, and all other of its creditors, combined, confederated, and agreed with the Houston and Texas Central Railway company, which is another corporation created by act of the legislature of the state of Texas, by an act entitled "An act to establish the Galveston and Red River Railway company," approved March, 11, 1848, and the several acts supplemental thereto and amendatory thereof, having its principal office and place of business in the city of Houston, and state of Texas, and county of Harris, and of which Wm. E. Dodge is president, and a non-resident of the State of Texas, and F. A. Rice is the treasurer, and A. S. Richardson is secretary, the two latter residents of Harris county, Texas; and the Houston and Texas Central Railway company, which will hereafter be designated by the letters H. & T. C. R. company, had at said date full and complete notice of your petitioner's rights under his contract with the W. & N. R. company, as hereinbefore set up and pleaded, and with full notice of the filing of your petitioner's original petition in this cause, to wit, July 16, 1870.

Which said combination, confederation, and agreement was to the effect, in substance and intention, to aid, assist, and contribute to the determination and intention of the W. & N. R. company, to hinder, delay, and defraud your petitioner, as a creditor, and all other creditors of said W. & N. R. company, as hereinbefore set out, and that the H. & T. C. R. company, on its part, aided and assisted by the W. & N. R. company, was to absorb, appropriate, and fraudently convert and merge, to its own use and benefit, all

the said property, rights, and franchise—in fact, the entire corpus and existence of the W. & N. R. company—into itself, regardless of law, equity, or the rights of stockholders, creditors, or your petitioner.

And in pursuance of the fraudulent combination and determination on the part of these two corporations, they entered into a contract in writing, of date about July, 1871, by which it was stipulated, among other things, that said H. & T. C. R. company was to complete and furnish the road of said W. & N. R. company from Bremond to Waco, Texas.

The road to be completed to Waco by the 1st of October, 1872, in consideration of which the W. & N. R. company executed its bond for $600,000,00 to said H. & T. C. R. company, payable, and to become due, January 1, 1873, and secured the payment of said bond by a deed in trust on its road, road-bed, franchise, etc., and the said W. & N. R. company bound itself not to issue any more or additional shares of its stock, and that in default of the payment of the bond the trustees, P. W. Gray and B. A. Botts, were to immediately foreclose the same, and sell at Houston, Texas.

76 That on or about October, 1871, these two corporations made and entered into a supplemental contract in writing, which, among other things, provided that said W. & N. R. company should issue to the said H. & T. C. R. company, for the latter's own use, benefit, and ownership, two thousand shares of the capital stock of the said W. & N. R. company, of the value of one hundred thousand dollars; and the said W. & N. R. company assigned and delivered to the said H. & T. C. R. company, also for the latter company's benefit and ownership, the bonds of the city of Waco, McLennan county, Texas, then a stockholder in said W. & N. R. company, to the amount of one hundred thousand dollars; the said bonds having been taken by the said W. & N. R. company from the city of Waco, as the consideration paid by the city of Waco for one thousand shares of the capital stock of said W. & N. R. company, and assigned and transferred to said H. & T. C. R. company, absolutely, and all notes, accounts, claims for taxes, and all other demands whatsoever, the assets of said W. & N. R. company, then held by it, and also to render an account of all its liabilities of every kind to said H. & T. C. R. company.

That at the time of making the first original contract and preliminary to it, and without which said original intention and determination of these two corporations could not have been executed with certainty, the said W. & N. R. company promised and agreed with said H. & T. C. R. company, as a secret, unwritten obligation, to procure the absolute transfer and assignment by the individual holders thereof, including the city of Waco, of a sufficient number of the shares of the capital stock of said W. & N. R. company to said H. & T. C. R. company, so as to give the latter a majority of said capital stock, and thereby insure to it the permanent control

of the directory of the W. & N. R company, which ownership of a majority of the capital stock then issued, together with the obligation of the W. & N. R. company, in said original contract to issue no more shares, would amount to a practical merger of the W. & N. R. company into the H. & T. C. R. company, but said W. & N. R. company, having failed to obtain the requisite number of shares to be assigned, provided in the supplemental contract of October 20, 1871, for the issuance to the H. & T. C. R. company of the two thousand shares therein provided for.

Afterwards, on or about October 21, 1871, through the aid, assistance, and persuasion of the W. & N. R. company, in pursuance of the said secret understanding, the said city of Waco did, by its agreement in writing, conditionally assign and transfer its shares of capital stock, which amounted to two thousand shares, of the face value of one hundred thousand dollars, to trustees who had absolute right to vote said stock for said W. & N. R. company, and on the 27th day of September, 1872, said trustees transferred said stock absolutely to said H. & T. C. R. company, a copy of which is hereto attached and marked Exhibit "F," and made a part hereof.

Your petitioner avers that said transfer of said stock of the city of Waco, through the assistance of the said W. & N. R. company, was in pursuance of the original confederacy and combination, and done to give said H. & T. C. R. company absolute control of the directory of said W. & N. R. company, and thereby, through such control, prevent the payment of the bond for $600,000.00, which, causing a default, would necessitate a sale under the deed in trust, at which sale the H. & T. C. R. company would buy at a nominal price, and thereby get absolute possession and control of all the property of the W. & N. R. company, and claim title as purchaser, rendering the W. & N. R. company absolutely insolvent, and stockholders and creditors of the W. & N. R. company nothing to represent their stock, or out of which to make their debts.

And that thereafter, on or about the 4th of November, 1872, the said H. & T. C. R. company, by means of its shares of the capital stock of said W. & N. R. company, so obtained through said supplemental contract, by the transfer of shares of individuals, and the shares obtained from the city of Waco, had and held a large majority of said stock of the W. & N. R. company, and did, on that day, by means of said stock, elect a majority of its own directors to be directors of said W. & N. R. company, and thereafter through its said directors assumed and exercised full, complete, and absolute control of the affairs and management of said W. & N. R. company.

That the road of the said W. & N. R. company was completed, equipped, and running to Waco on or about September, 1872, but in the possession of the said H. & T. C. R. company through said contracts, and the said H. & T. C. R. company continued to keep and hold possession of said road as lessees, receiving and appropriating all the revenues and profits of the same.

That in furtherance of the original fraudulent agreement of these two corporations and in consummation of the same, the H. & T. C. R. company, by means of its control of the directory of said W. & N. R. company, willfully prevented any effort by any one to pay said bond or any part thereof, or to relieve in any way, or to prevent a default in said deed of trust, though the amount necessary to pay off said bond could easily have been borrowed or raised by the sale of new bonds, as the road, as completed and equipped, was ample security for that amount.

That on or about February, 1873, P. W. Gray and B. A. Botts, trustees in said deed of trust, sold the property described in the same, and the H. & T. C. R. company became the purchaser at the sum of four hundred thousand dollars, said property being at that time well worth one and a half million dollars; and the trustees executed their deed of conveyance to the H. & T. C. R. company therefor.

Your petitioner avers and charges that all the above recited acts and doings of these two corporations were illegal, fraudulent, and void; because both companies are and were corporations chartered by the legislature of the state of Texas for specific purposes, and neither had the power or authority to so contract as aforesaid; because all said acts were against public policy; because at the date of said pretended transfer of the property of the said W. & N. R. company there could be no legal sale and purchase, as there was in fact but one party to it at the time, and that the said H. & T. C. R. company; because of the gross inadequacy of price pretended to be paid; because there was no necessity for said sale, it having been brought about by the said H. & T. C. R. company for the purpose of absorbing and merging said W. & N. R. company; because all said acts were conceived and executed for the purpose of defrauding and injuring your petitioner, and they did damage and injure your petitioner as aforesaid, and of whose rights and demands against said W. & N. R. company the said H. & T. C. R. company had full notice.

77 That on or about the 24th day of June, 1874, the said H. & T. C. R. company ordered a meeting of the late directors of the said W. & N. R. company to be held at Waco, and they did assemble at Waco, a majority of whom were directors of the H. & T. C. R. company, and these late directors granted and conveyed to the said H. & T. C. R. company all the lands and land certificates to which the said W. & N. R. company was entitled as a donation from the state of Texas, amounting in the aggregate to five hundred thousand acres of land, which the said H. & T. C. R. company afterwards located on the unappropriated domains of the state of Texas, in what is known as Childers, Cattle, Kent, Tom Green, Howard, Mitchell, and other counties of the state of Texas, and well worth, at that time, one million of dollars, the consideration of which was pretended to be two hundred thousand dollars, claimed by the H. & T. C. R. company to be due it from the W. & N. R. company, under said bond and deed in trust.

Your petitioner avers and charges that all the said acts of the said board of directors, then and there assembled, were illegal, fraudulent, void, and done and perfected in pursuance with said fraudulent original undertaking and understanding between these two companies; because, if they had any authority at all to act, it was merely to make such equitable distribution of these lands and assets of the W. & N. R. company as was right and just to all parties interested in said company in any right; because said sale transfer was in violation of the statute donating said lands to said W. & N. R. company; because there was no legal sale, for want of proper parties, the two companies at that time having become, through their directory and ownership of stock, practically but one corporation; because of the gross inadequacy of price pretended to be paid; because it was in fraud of your petitioner's rights, and has injured and damaged him by reducing the W. & N. R. company to a state of absolute insolvency and bankruptcy, and said W. & N. R. company is now hopelessly bankrupt, and petitioner is prevented from obtaining his just compensation for his debts and damages, and because it was ultra vires in both companies.

That since the acts of these two companies, hereinbefore recited, the said H. & T. C. R. company has become insolvent; that your petitioner was at said dates, and is now, the principal, if not the only legal creditor of the said W. & N. R. company, and all together the property of said W & N. R. company, which, by the said different acts and agreements, passed into the hands, and which it still enjoys, of the H. & T. C. R. company, was worth, and still is worth, at least one million dollars over and above all the just debts and liabilities of the said W. & N. R. company, to wit, the entire road, road-bed, franchise, superstructure, equipments, etc., of the road of the W. & N. R. company, which purported to pass under the sale by the trustees, of the value of one and one-half million of dollars; five hundred thousand acres of land and certificates, situated as aforesaid, pretended to pass by said sale of the directors, the donation of the state to the W. &. N. R. company, of the value of one million dollars; Waco city bonds, of the value of one hundred thousand dollars; capital stock of said W. & N. R. company, issued by it to the H. & T. C. R. company, of the value of one hundred thousand dollars; 150 acres of land in Bremond, in Robertson county, Texas; 68 acres of land at Marlin, Falls county, Texas; 20 acres of land at Waco, McLennan county, Texas, which, with the tax lists, subscription list, and other property of the W. & N. R. company, was of the value of three hundred thousand dollars, the consideration for all which was pretended to be the original bond for $600,000, agreed to be paid by said W. & N. R. company to said H. & T. C. R. company, as aforesaid.

That by means of the foregoing recited acts and doings of these two corporations in and about said contracts; the assignment of

stock in said W. & N. R. company, by itself, by individual owners, and the city of Waco; the assignment of the notes, accounts, claims for taxes, the assets of said W. & N. R, company, the election of directors from the directors of the said H. & T. C. R. company; the sale under the trust deed and purchase by said H. & T. C. R. company, and other acts hereinbefore set out, the said H. & T. C. R. company assumed, took possession of, and exercised, and continues to exercise, absolute control over the road, property, franchise and assets, and over the affairs and management of said W. & N. R. company, and receives and appropriates all the profits and benefits arising therefrom to its own use, and claiming the absolute right so to do, by virtue of all said acts and doings as aforesaid, regardless of and in fraud of the rights of said W. & N. R. company, and especially in fraud of the rights of your petitioner, to prevent the collection of his just demands against said W. & N. R. company, of whose and which demands the said H. & T. C. R. company had full notice, as hereinbefore set out.

Your petitioner now gives notice to said W & N. R. company and H. & T. C. R. company and all other defendants to produce on the trial hereof, the two contracts herein described; the deed of conveyance by Gray and Botts, trustees, and the deed in trust executed by W. & N. R. company to Gray and Botts; the transfer of the lands of the W. & N. R. company, received by it as a donation from the state; and all the books, papers, and minutes of said W. & N. R. company, including engineers' estimates; the books and letter-book of the secretary and treasurer of said W. & N. R. company; so much of the records of the acts of the said H. & T. C. R. company as pertain to the W. T. R. company or W. & N. R. company; a complete list of the directors and officers of said H. & T. C. R. company for the years 1871-'2-'3-'4-'5 and 6; the contract between said H. & T. C. R. company and the city of Waco, as specified herein; the patent for the lands donated to the W. & N. R. company, and transferred by the directors to the H. & T. C. R. company, and located and surveyed by said H. & T. C. R. company, as herein charged, or if patents are not yet issued, a full description of the certificates issued to said W. & N. R. company by the state, and located by said H. & T. C. R. company; or if patents are issued and not delivered, then a full list and description of said land, by number of acres, No. of sections, and counties where located, of land so located, or such description of said certificates, surveys, or lands, as will fully identify them, as all this is within the possession or knowledge of said H. & T. C. R. company.

Your petitioner further shows that the said W. & N. R.
78 company, in its deed of trust of July 6, 1871, conveyed to Gray and Botts the following described property, and no more, viz: all and singular the several tracts and parcels of land which might then or thereafter constitute the site of the railway turn-outs, depot grounds and appurtenances, and all lands which then were or might thereafter constitute and be a part of the

road and right of way thereof, of the said Waco and Northwestern Railway company, from the town of Bremond, where it connects with the road of the Houston and Texas Central Railway company, to the depot grounds in the city of Waco, on the east side of the Brazos river, and thence as authorized by the charter of said Waco and Northwestern Railroad company, and also the cross-ties and other superstructure which had then or might thereafter be constructed, placed, and built on the line of said road, as aforesaid; and also, all and singular the chartered privileges and franchises of every kind granted to said Waco and Northwestern Railroad company, by acts of the legislature of the state of Texas, of which it might then or thereafter be possessed or become entitled to under the laws of the state of Texas relating to railroads."

That the right to the land to which said W. & N. R. company was entitled, and would have become entitled to receive as a donation from the state of Texas, viz: the land-grant of 16 sections for each mile of constructed road, was not included in said deed of trust to said Gray and Botts; that the same is a part of the assets and property of the said W. & N. R. company, and as such, with all other property and assets belonging or formerly in possession of said company, as hereinbefore set out, is subject to the payment of the claims of creditors and stockholders of the said W. & N. R. company, in in the hands of said H. & T. C. R. company and the claims of your petitioner.

That said land grant amounted to about five hundred thousand acres of land and land certificates, worth one million dollars, and described as follows:

2 surveys of 640 acres each, located by said H. & T. C. R. company, in Wilbarger county, Texas, by virtue of two certificates or scrip, issued to said W. & N. R. company, and filed and located in block H, certificate Nos. 1 and 2, making 1,280 acres.

191 surveys of 640 acres each, located by said H. & T. C. R. company, in Hardeman county, Texas, by virtue of 191 certificates or scrip, issued to said W. & N. R. company, and located and filed in block H, certificate Nos. from 3 to 193, making 122,240 acres.

162 surveys of 640 acres each, located by said H. & T. C. R. company, in Childers county, Texas, by virtue of 162 certificates or scrip, issued to said W. & N. R. company, and filed and located in block H, numbers from 194 to 255, 259 to 273, 277 to 291, 295 to 300, 313 to 327, 335 to 348, 360 to 372, 386 to 398; making 103,680 acres.

43 surveys of 640 acres each, located by said H. & T. C. R. company, in Cottle county, Texas, by virtue of 43 certificates or scrip, issued to said W. & N. R. company, and filed and located in block H, certificate numbers from 256 to 258, 274 to 276, 292 to 294, 310 to 312, 328 to 334, 349 to 359, 373 to 385; making 27,620 acres.

1 survey of 640 acres, located by said H. T. & C. R., in Garza county, Texas, by virtue of one certificate or scrip, issued to said

W. & N. R. company, and filed and located in block G, certificate number 399.

99 surveys of 640 acres each, located by said H. & T. C. R., in Kent county, Texas, by virtue of 99 certificates, or scrip, issued to said W. & N. R. company, and filed and located in block G, certificate numbers from 400 to 498; making 66,360 acres.

2 surveys of 640 acres each, located by said H. & T. C. R., in Hansford county, Texas, by virtue of 2 certificates or scrip, issued to said W. &. N. R. company, and filed and located in block 32, certificate numbers 499 and 500; making 1,280 acres.

158 surveys of 640 acres each, located by said H. & T. C. R. company, in Tom Green county, Texas, by virtue of 158 certificates, or script, issued to said W. & N. R. Company, and filed and located in blocks as follows: certificates from 501 to 546 in block 1; numbers from 547 to 585 in block 2; numbers 586 to 598 in block 3; numbers from 599 to 608 in block 4; numbers 609 to 610 in block 5; numbers 705 to 725, block 29; numbers 726 to 752, block 30; making 101,120 acres.

66 surveys of 640 acres each, located by said H. & T. C. R., in Howard county, Texas, by virtue of 66 certificates or scrip, issued to said W. & N. R. company, and filed and located in block 29, certificate numbers 611, and from 616 to 625, 630 to 639, 644 to 653, 658 to 667, 672 to 681, 686 to 695, 700 to 704; making 42,240 acres.

28 surveys of 640 acres each, located by said H. & T. C. R., in Mitchell county, Texas, by virtue of 28 certificates or scrip, issued to said W. & N. R. company, and filed and located in block 29, certificate numbers from 612 to 615, 626 to 629, 640 to 649, 654 to 657, 668 to 671, 682 to 685, 696 to 699; making 17,920 acres.

All said surveys and locations are fully shown and delineated on the maps of said several counties, now on file in the general land office at Austin, Texas, and as well are the field-notes of said surveys, as made on the ground, on file in said office.

Your petitioner is informed and believes, and so charges, that though entitled to them, but very few, if any, of the patents to the lands aforesaid have been demanded and received by said H. & T. C. R. company, or have been made out by the commissioner of the general land office; therefore, it is impossible for him to give the particular description of land, the field notes only being returned to the land office.

And your petitioner here prays that said H. & T. C. R. company be required to file copies of such field notes, or other sufficient description in this cause, as the same are in their possession, as to procure certified copies from the land office would incur an enormous expense to your petitioner unnecessarily.

That the pretended claim of title of the said H. & T. C. R. company, under said contracts and deed, and the deed from Gray and Botts to said H. & T. C. R. company, the pretended ratification of sale by the late directors of the W. & N. R. company, and transfer

of said land grant by said directors, as before set out, is a
79 cloud upon the title of said W. & N. R. company to the said property, and unless removed would prevent a sale of the property at its fair value, to satisfy the judgment petitioner may obtain against said W. & N. R. company.

That John T. Flint, W. R. Kellum and Richard Coke, resident citizens of McLennan county, Texas; W. R. Raker, W. J. Hutchins, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, A. Groesbeck and T. M. Shirley, all resident citizens of Houston, Harris county, Texas, except T. M. Shirley, who is a citizen of the state and county of New York, were directors of the W. & N. R. company at the time of the sale by Gray and Botts, as trustees, under said deed in trust, that they have taken no steps to settle the affairs of said company, and pay its debts, out of the property and effects of said company, as it was and is their duty to do, as trustees and stockholders of the company.

Your petitioner prays that the Houston and Texas Central Railway company, as aforesaid, be made a party defendant herein, and that the said directors, as trustees aforesaid, also be made parties defendant, and be cited according to law, to answer your petitioner herein, except T. M. Shirley, who is plaintiff herein.

And that, on final trial hereof, in addition to and with the relief hereinbefore asked, he may have his judgment against the said Waco and Northwestern Railroad company, the successor of the Waco Tap Railroad company, aforesaid, for his said sums of money due and unpaid, all his said claims, demands, damages, profits and losses, as aforesaid, together with his interest and costs, and that his said lien upon said road, road-bed, franchises, etc., of said W. & N. R. company, be foreclosed, according to law, said interest to begin April 3, 1870, and said judgment to be in American coined gold, as specified in said contract.

That, in addition, the cloud on the title of the said W. & N. R. company to said land grant or certificates be removed; or, if your honor be of the opinion that the land grant from the state was included in said deed of trust and deed of conveyance by said Gray and Botts, then that said deeds be set aside, because made in fraud of the rights of creditors and stockholders of said W. & N. R. company, and your petitioner, as aforesaid, and said lands, or the certificates subjected to their claims; that the two said contracts, and all sales, transfers, ratifications, and all hereinbefore recited acts between these two said corporations, be declared null and void, and that said road, road-bed, franchise, and all property, assets and rights, land grants or certificates, now in the hands of said H. & T. C. R. company, coming from, or having been received of, said W. & N. R. company, through the two contracts, or any other means, be decreed to be held by said directors, as trustees, aforesaid, as the land, assets and effects of said W. & N. R. company, in trust for the payment of petitioner's claims, and the claims of all creditors and stockholders of said W. &. N. R. company, who may come in

under your petitioner, or with him, bearing their share of the expense of this litigation, and for judgment against said directors of said W. & N. R. company, for your petitioner's debt, losses, profits, damages and interests and costs, in America coined gold; and that said judgment, as to said directors, be satisfied out of the assets, effects and property of the said W. & N. R. company, that shall come to their hands, under the decree of this court, or by any other means, and that they be held jointly and severally responsible therefor, and for such further orders and decrees as your petitioner may be entitled in law or equity.

And your petitioner will ever pray, etc.

E. A. McKENNEY AND
THOS. HARRISON, *for Plaintiff.*

Exhibit "A."

Articles of agreement, made and entered into this the 29th day of July, A. D. 1869, between Thomas M. Shirley, of the city of Houston, of the one part, and the Waco Tap Railroad company, of the other part, whereby it is covenanted and agreed as follows, viz.:

1st. That the said Thomas M. Shirley, contractor, does hereby covenant and agree to form and prepare, finish and execute, in a workmanlike manner, the clearing, grubbing, excavating, embankment, trestling, surfacing, track-laying, and to furnish the crossties of the said road, entire, from the junction of the Houston and Texas Central Railway to the town of Waco.

2d. The execution of this contract shall conform in all respects to such specifications, and to such plans or profiles, or to such notes of surveys and levels as may from time to time be furnished by the engineer of said corporation. But the same shall be regulated and controlled, nevertheless, by the specifications, so far as they relate to this contract, marked "A;" which is hereby made a part and parcel of this contract. And whatever addition in the line, levels, plans or specifications the engineer may consider expedient, during the progress of the work, shall be made upon the same terms, and according to the same rate of prices as other similar kind of work under this contract.

3d. The work under this contract shall be commenced on or before the 1st day of September, A. D. 1869, and shall be made and completed on or before the 1st day of September, A. D. 1871; and for a failure to make and complete the same within the time fixed for its completion, the engineer for the time being, may assess such damages as may be just and equitable, and charge the said contractor with the amount thereof; and the engineer may, after giving 30 days' written notice to the contractor, to increase his force, so as to hasten the completion of his contract; and his failure to do so, employ other assistance, as in his opinion may be necessary to the completion of the work within the specified time, and the

expense of such assistance shall be paid. But if the execution of any part of the work be delayed, by any act or failure on
80 the part of the before-mentioned corporation, the contractor, shall, at the time of such hindrance, give notice thereof in writing, to the engineer, and with respect to the portion of the work thus delayed, shall, upon such notice, become entitled to an extension of the time of completion named in this contract equivalent to the time of such delay.

4th. The contractor shall not transfer this contract without the consent of the president of this company. In all sub-contracts made by the contractor, the work shall be considered as under his immediate charge, and he shall at all times manage the same as though no sub-contract existed. The contractor shall, upon the application of the engineer, for the time being, discharge any workman or laborer from his employment, and shall not employ any workman or laborer who has been discharged for improper or disorderly conduct. The contractor will co-operate in the maintenance of such system of police, and will conform to such regulation as in the opinion of the engineer for the time being shall conduce to the regular and peaceable progress of all parts of the work, and tend to prevent all unnecessary interference with the rights, privileges, and property of all persons in the vicinity of the railroad.

5th. On condition of the fulfillment by the contractor of the foregoing provisions of this contract, the Waco Tap Railroad company doth hereby promise and agree that the said corporation shall and will, for doing and performing the work as aforesaid, pay, or cause to be paid, to said Thomas M. Shirley, the said contractor, or to his heirs, executors, assignees, or administrators, at the rate of twenty-five cents per cubic yard for excavation and embarkment in common earth or clay; for "hard-pan," or such other material not herein specified, that cannot be removed in greater quantities than six cubic yards per day by an experienced first-class railroad laborer, forty cents per cubic yard; excavation in loose rock, seventy-five cents per cubic yard; excavation in solid rock, one dollar and ten cents per cubic yard; grubbing, per chain of 100 feet, five dollars; clearing two hundred and fifty feet, with three hundred and fifty cross-ties, forty-five cents each; trestling, six dollars and fifty cents per lineal foot; surfacing, one hundred and fifty dollars per mile; laying track, five hundred and fifty dollars per mile. Compensation for the above labor all to be paid in American coin at the office of the company.

6th. The engineer for the time being shall decide on the quantity and quality of the work done, in accordance with the specifications hereto attached.

7th. Monthly estimates, during the progress of the work, will be made by the engineer, of the work done to his satisfaction, to such amount as shall, in his judgment, be a fair average value of the same, agreeably to this contract; and of the amount so estimated, the contractor will be paid eighty-five per cent.; and when

the whole work hereby contracted for shall have been completed agreeable to this contract, the balance shall forthwith be paid to the said Thomas M. Shirley, his heirs, executors, assignees, or administrators. And the company will secure to the said contractor the payment of the said fifteen per cent., as well as any other sum that may be due and unpaid, by mortgage on their road-bed, superstructure, rolling-stock, lands, franchise, and other property; the said mortgage to be duly executed as soon as the reserved fifteen per cent. on the work done shall amount to the sum of twenty thousand dollars, together with any other sum or sums that shall have accrued and become due, which mortgage shall be payable on the final completion of the entire work. At the end of each and every month the company shall give their note, bearing ten per cent. interest, for whatever sum may be due upon the monthly estimate, as also the reserved percentage, to be secured as above specified. The company shall also execute their notes, with ten per cent. interest from date of purchase, for all iron, rolling-stock or other material or property that the contractor may purchase, by approval of the president of the company, which notes shall, in like manner, be secured by mortgage as above specified. As the entire work specified in this contract is not required to be done before the expiration of twenty-four months, it is hereby expressly understood and agreed that said company is not compelled to pay said contractor, on monthly estimates, more than eighty-five per cent. of one twenty-fourth part of the work done; provided, however, that if said Shirley shall complete more than the twenty-fourth part of the whole of the contract in one month, then the said company shall pay the full amount of each such monthly estimate, less the fifteen per cent. reserved, if in funds. And it is also agreed between the above contracting parties that should the work, or any portion of it, executed, not be of such quality as herein stipulated to be made; that is to say, that if the work, or any portion of it, in the opinion of the engineer, be constructed in an inferior manner, then, and in such case, the monthly or final payments, above provided for, may be withheld until such time as the engineer shall decide that the spirit of this contract has been complied with; or, instead thereof, the engineer may make such deduction from the price herein stipulated to be paid as may be fair and right.

Provided, however, that the engineer shall notify the contractor, during the progress of the work, stating plainly and explicitly wherein the work being done does not conform to the contract and specifications, and after the work shall have been completed without notice, it shall not be complained of by the engineer.

8th. And it is further agreed to between the parties hereto, that in case the said contractor shall refuse or neglect to perform all the covenants hereinbefore enumerated, or shall violate the spirit thereof, upon the engineer certifying such neglect, refusal, or violation to the president of said company, the president may, at his option, after careful investigation and due notice in writing, to the contrac-

tor, and his refusal to remedy the evils complained of, declare this contract null and void; and in that case, whatever balance may be due and unpaid for work done shall be forfeited to the use of said company, or such part thereof as may be equitable and just; and the said president may proceed to relet or dispose of the work remaining to be done, as if this agreement had never been made.

81 9th. And it is further agreed between the contracting parties that the iron shall be laid and the road finished complete, as fast as sections of ten miles can be completed for the rails, and the company obligate themselves to provide iron, and an engine and necessary cars to haul the supplies of the contractor, and distribute the iron, ties, etc., as the work progresses, and the contractor shall have the privilege of operating the road, and be entitled to all the profits arising therefrom, as finished, until all claims are fully paid off and discharged by the company. A final estimate is to be made, and the grading accepted by the company, as fast as completed, in sections of three miles. It is further agreed that the contractor shall have the right to construct the bridge across the Brazos river, according to such plans and specifications and upon such terms as may hereafter be agreed upon between the said contractor and the president of the company, and such agreement so to build said bridge, shall, when so made, be considered a part and parcel of this contract. The contractor shall, contemporaneously with the signing of this contract, enter into a bond or obligation with the company, to be considered a part and parcel of this instrument, with security to be approved by the president of the company, for the faithful compliance with and fulfillment of the contract.

10th. Should the work be suspended by the said company for six months, or this contract be plainly violated on their part, then, in such case, this contract shall be null and void, at the option of the contractor, and all sums due the contractor, as well as the reserved percentage retained, shall become due and the mortgage shall be foreclosed; and it is further agreed that the mortgage shall be so drawn that in the event of such contingency it may be foreclosed without delay or involving the contractor in litigation. It is further considered a part of this contract that the president and directors shall do all in their power to aid the contractor in obtaining labor, supplies, timber, etc., and lend their cordial support and influence to facilitate the contractor in every way in the prosecution of the work.

11th. When the said company shall have paid or secured to the satisfaction of the contractor for the work herein specified the sum of one hundred and fifty thousand dollars, then the said contractor hereby obligates himself to advance toward the said work the sum of twenty-five thousand dollars ($25,000) in work; and when the said company shall have paid to, or secured, as aforesaid, the further sum of fifty thousand ($50,000) dollars, then the said con-

tractor hereby binds himself to advance the further sum of twenty-five thousand ($25,000) dollars in work; and when the said company shall have paid or secured, to the satisfaction of the contractor, within one hundred thousand ($100,000) dollars of whatever sum that may be requisite to complete the road, the contractor hereby obligates himself to complete the entire work herein contemplated and specified in this contract. Provided, that mortgages shall be executed by the company to the said contractor for the advancements made, or money so expended by him, as hereinbefore provided in this contract. All sums of money to be paid, or notes to be given, as specified in this contract, shall, and are to be, paid in American coin.

12th. In case of default or failure on the part of the contractor, he binds himself to account and pay, and be liable to said company, at its office, in the city of Waco, for all loss, injury and damage by it sustained.

In testimony of all of which the contracting parties have signed their names and affixed their seals (using scrolls for seals), at Galveston, Texas, the day and date first above written, the Waco Tap Railroad company signing by their president, subject, however, to the approval of the board of directors of said company; interlineations made before signing.

(Signed) J. W. SPEIGHT,
President W. T. R. R. Co. [SEAL.]

(Signed) THOMAS M. SHIRLEY. [SEAL.]

Exhibit B.

CALVERT, *March* 23, 1870.

T. M. SHIRLEY, Esq., Houston, Texas.

DEAR SIR: It is with regret that I am obliged to call your attention to the enclosed copy of a resolution passed by our directors on the 18th inst. The condition your work is now in, and your total failure to carry out the contract according to its intent and spirit, amounts to a failure on your part. You are hereby required to comply strictly with the requirements contained in the enclosed resolution (except that you will be allowed 25 days from the receipt of this notice, which will make 32 days from its passage, to carry out the demands there made). I am further instructed to inform you that no estimates will be paid you till your work is in a more satisfactory condition. You will please acknowledge the receipt of this notice by telegraph to me at Marlin.

Respectfully, E. L. HERIOT,
Chief Engineer.

Exhibit C.

WACO, *March* 18, 1870.

Resolved, That the engineer serve a notice on the contractor to put one hundred working hands upon the work within fifteen days from this time, and that he keep that many hands constantly em-

ployed, and that a default in these requirements will be treated as a violation of the contract, and the president and engineer are requested to hold the said contractor to a rigid performance of the contract.

E. L. HERIOT,
Engineer Waco Tap R. R. Co.

I above transmit you a copy of a resolution of the board of directors, passed this day, for your observance.

Yours truly, JOHN T. FLINT,
President W. T. R. R. Co.

82 *Exhibit "D."*

WACO, TEXAS, *April* 2, 186–.

THOMAS M. SHIRLEY:

I have declared your contract null and void, and will not recognize you any longer as a contractor on the Waco Tap Railroad.

JOHN T. FLINT,
President W. T. R. R.

Exhibit "E."

Waco Tap Railroad.

Contractors and hands wanted.—Thomas M. Shirley having virtually abandoned the work on the Waco Tap R. R., and violated in other respects the spirit of his contract, the same is declared null and void this day, and the said Shirley will no longer be recognized as a contractor thereon. Contracts for section work, general work, and for ties and bridging are solicited, and general laborers wanted. Good prices will be paid.

JOHN T. FLINT,
President W. T. R. Co.

Waco, April 2, 1878.

The contract between the city of Waco and the Houston and Texas Central Railway company is as follows:

This deed of agreement and trust, made between the Houston and Texas Central Railway company, a body politic and corporate, created and acting under the acts of incorporation from the state of Texas, party of the first part, herein acting by Abraham Groesbeeck, vice president of said company, acting in the absence of its president from the state of Texas; and the city of Waco, a corporation created by the laws of the said State, herein acting by Benjamin F. Harris, mayor of said city—witnesseth:

1st. That the party of the first part, in consideration of the acts and transfers hereinafter done and performed by the party of the second part, agrees, covenants and pledges that it will perform and keep its agreement to construct the railroad of the Waco and North-

western Railroad company from the town of Bremond, in Robertson county, to the depot grounds obtained of Giddings and others in the city of Waco, on or before the first day of October, A. D. 1872; provided, that the said Waco and Northwestern Railroad company shall keep and perform its covenant to grade and furnish ties for said road on or before the first day of June, A. D. 1872; and also the party of the first part agrees and covenants that should it hereafter become the owners or proprietors of the said Waco and Northwestern Railroad, from the town of Bremond to Waco as aforesaid, under any agreement with said company which has been or may hereafter be made between them, or should it become the owner of a majority of the stock of the said Waco and Northwestern Railroad company, then that said party of the first part, its successors or assigns (the Houston and Texas Central R. company,) shall and will permanently and regularly operate the said railroad from Bremond to Waco, unless prevented by accidents or casualties, and will also keep up and maintain a passenger and freight depot for the convenience of said city of Waco, on the said depot grounds of twenty acres obtained from Giddings and others for depot purposes in said city, and adjoining the suspension bridge property, on the east side of the Brazos river; and that the depot shall not be removed from the twenty-acre tract of land without the consent of the party of the second part. And the party of the second part, in consideration of the agreements and covenants to be done and performed by the party of the first part, and of the benefits and advantages thereby secured to the city of Waco in the construction of said railroad to the city of Waco, hereby transfers, assigns and conveys to Benjamin A. Botts, Peter W. Gray and John T. Flint, and the survivor and survivors of them, as trustees for the parties hereto, the entire stock subscribed, owned, and held by it (the city of Waco) in the Waco and Northwestern Railroad company, amounting to one hundred thousand dollars of paid up stock, which was taken up and held by virtue of an ordinance of the said city of Waco, and vote of its inhabitants authorizing the subscription therefor, for the purpose contemplated by the agreement, and do hereby deliver said stock to said trustees, and direct the issue of certificates therefor to them, to be held by them upon the terms and conditions following, viz: 1st. That upon the completion of said railroad from Bremond to the said depot grounds in the city of Waco, on or before the first of October, A. D. 1872, as hereinbefore stipulated, then said trustees, or either one of them, or any of them, shall make a transfer and assignment of said stock to the party of the first part, its heirs or assigns; but should the party of the first part fail to comply with the stipulations hereinbefore made for the completion of said railroad to the city of Waco, then the said trustees, or any or either of them, shall transfer, assign and convey said stock to the party of the second part.

2d. Said trustees are irrevocably authorized, until the time for completion of the said railroad to Waco, and until thereafter they

shall have transferred the said stock according to the terms aforesaid, to act and vote as proxy for said stock at any meeting of the stockholders of the Waco and Northwestern Railroad company, as may be agreed upon by a majority of the said trustees then living; provided, that no vote shall be cast which shall dissolve the organization of the said railroad company until the completion of the said railroad to the depot in the city of Waco, and cars run over the same from Bremond to that point; nor shall any vote be cast that will throw any obstacle in the way of said Waco and Northwestern Railroad company in its work of grading and furnishing ties for its railroad according to its contract with the party of the first part.

3d. In case of the death of either or any of said trustees, the power of the others or either of them to act shall remain full and complete, and in the case of the death or failure to act of all of them, then the president of the city bank of Houston then in office shall succeed to and exercise all the powers herein conferred on said trustees.

83 In witness whereof, the said Abraham Groesbeeck, acting as president aforesaid, under authority of the resolution of the board of directors of the party of the first part, and the secretary of said company hereto sign their names and affix the common seal of the said company, party of the first part, on the 31st day of October, 1871; and the party of the second part, acting by its mayor, under authority of an ordinance of the city of Waco, passed by the city council, and the secretary of said corporation hereto sign their names and affix the corporate seal of said city, on the 21st day of October, 1871.

Executed in duplicate.

B. F. HARRIS,
Mayor of Waco, Texas.

Attest:

D. S. WALLACE,
Secretary of City Council.

By virtue of the powers vested in the undersigned, P. W. Gray, R. A. Botts, and John T. Flint, trustees in a certain instrument of agreement and trust, dated October 21, 1871, made between the Houston and Texas Central Railway company and the city of Waco, we hereby assign and transfer unto the said Houston and Texas Central Railway company two thousand shares of the stock of the Waco and Northwestern Railroad company, and authorize Messrs. Flint & Chamberlin to transfer the same in the books of the company.

Dated at Houston, Texas, this 27th day of September, 1872.

P. W. GRAY,
JOHN T. FLINT,
BENJ. A. BOTTS,
Trustees.

(Endorsement:) No. 1779. T. M. Shirley *vs.* Waco Tap R. R. co. et als. First amended original consolidated petition. Filed Nov. 10th, 1881. Z. F. Beasley, C. D. C., McLennan county, Texas.

84 *Petition.*

District court, McLennan county, Texas.—Fall term, A. D. 1870.

To the Hon. WM. CHAMBERS, judge, &c.

Your petitioner, T. M. Shirley, a citizen of Harris county
85 and state of Texas, complains of the Waco Tap Railroad company, a corporation chartered by the state of Texas, and having its principal office at Waco, McLennan county, Texas, and doing business under the name and style of the Waco Tap Railroad company as aforesaid.

And respectfully shows unto your honor:

That on or about the 29th day of July, 1869, he entered into a contract with said company, which was then reduced to writing & signed by himself and J. W. Speight, as president of said company, for said company, and which contract your petitioner is informed and believes was afterward countersigned by the board of directors, and that by a resolution of said board of directors said contract was accepted by them, a substantial copy of which contract is hereto attached, marked "A," and made a part of this petition.

In consideration of the payments, rights and profits as specified in said contract, your petitioner agreed & bound himself to form, prepare, finish & execute in a thorough & workmanlike manner the clearing, grubbing, excavating embankment, trestling, surfacing, track laying & to furnish the cross-ties for the said Waco
86 Tap Railroad entire from the junction of the Houston and Texas Central Railway company to the town of Waco, both points being in the state of Texas. In said contract your petitioner bound himself to begin work on said road on or before the first day of September, 1869, which time was extended for twenty days afterwards at request of your petitioner, & to complete & finish said work on or before the first day of September, 1871, making in the aggregate two years of time within which to fulfill the terms of said contract, and it was further agreed that said work should be done according to contract specifications, which were in writing & attached to said contract, & such additions or alterations of the work as the engineer of said company might consider expedient were to be made upon the terms of the original contract.

Your petitioner bound himself in said contract to said company to pay all damages that might accrue by a failure to complete the work in the specified time; & also, that after proper notice to increase his working force, to pay damages for such failure; and further, that said company might reserve fifteen per cent. out of each

monthly payment to your petitioner under said contract;
87 & if said work was not performed to the satisfaction of the engineer of said company, then the whole of such monthly payment should be held by said company until said work was properly done; & your petitioner bound himself in a bond with two sureties, approved by the said president, in the penal sum of one hundred thousand dollars for the faithful performance of the entire contract. Your petitioner avers that by said contract said company was bound & agreed to pay to your petitioner in American coin (meaning the legal coined money of the United States), at the office of said company in Waco, Texas, for said work, done under said contract, at the rate of twenty-five cents per cubic yard for excavating embankment in common earth or clay; for hard-pan or such other material not herein specified as cannot be removed in greater quantities than six cubic yards per day by an experienced first-class railroad hand, forty cents per cubic yard; excavating in loose rock, seventy-five cents per cubic yard; excavating in solid rock, one dollar and ten cents per cubic yard; grubbing per chain of one hundred feet, five dollars; clearing two
88 hundred feet wide, three hundred and fifty dollars per mile; cross-ties, forty-five cents each; trestling, six dollars and fifty cents per lineal foot; surfacing, one hundred and fifty dollars per mile; laying track, five hundred and fifty dollars per mile.

It was further agreed in said contract that said company should pay your petitioner each month during the progress of the work such an amount as the engineer should estimate to be a fair average value of the work done each month, agreeable to said contract, and of the amount so estimated said company agreed to pay your petitioner eighty-five per cent., and when the whole work as contracted for should have been accepted by the engineer and completed agreeable to said contract, then the whole should be paid to your petitioner, including the fifteen per cent that had been reserved.

It was further agreed in said contract that for the purpose of securing to your petitioner the fifteen per cent. which was to be retained by said company out of each monthly estimate, as well as any other sum that might be due and unpaid by said company, that said company would make, execute, and deliver to your petitioner
89 a proper mortgage, in good and sufficient terms, upon the road-bed, superstructure, rolling stock, lands, franchises, and other property; the said mortgage to be duly executed as soon as the reserved fifteen per cent. on the work done should amount to the sum of twenty thousand dollars, which mortgage was to become due and payable upon the final completion of the work, and at the end of each and every month said company was to make, execute, and deliver its promissory note in writing, to bear ten per cent. interest, for whatever sum may be due upon each monthly estimate, as well as also to include the reserved fifteen per cent.

It was further agreed by the parties and specified in said contract that your petitioner, with the approval of the president of said com-

pany, might purchase iron rolling stock (meaning locomotives and cars), or other property necessary to run said company's road, and put the same in operation if your petitioner saw fit to do so, and should have the privilege of operating the same, and be entitled to all the profits, without account to the company,
90 arising from the business of said road until all claims, debts, and just demands of whatever kind of your petitioner be fully satisfied, paid, and discharged, all which your petitioner had intended to do, and the said company agreed to make, execute, and deliver to your petitioner the said company's promissory note or notes in writing for said iron, rolling stock, &c., as aforesaid, and to be secured by mortgage in like manner as the other indebtedness to your petitioner as aforesaid.

It was further agreed by said company, & it obligated itself, that when the road was completed & finished in sections of ten miles to provide iron & an engine & necessary cars to run the road for that distance & to haul the supplies, distribute iron, ties, &c., for your petitioner; & it was further agreed that your petitioner should have the right to construct the bridge for said company across the Brazos river, upon such terms as might thereafter be agreed upon between the parties to said contract, & such agreement when made should be a part of & subject to all the terms & securities of the original contract.

It was further agreed, & said company was obligated in said contract, that if the work of your petitioner should be suspended
91 by said company, or this contract plainly violated on the part of said company, then in either or both such cases all sums due the contractor, as well as the reserved fifteen per cent. retained, should become due and payable, & the aforesaid mortgage should be foreclosed at once, & it was agreed that the mortgage be so drawn that in the event of such contingency it might be foreclosed without delay, or involving your petitioner in litigation or expense to obtain his just demands.

It was further agreed, and your petitioner obligated himself to said company, that when said company had paid or secured to your petitioner under said contract the sum of one hundred and fifty thousand dollars, then your petitioner would advance to said company twenty-five thousand dollars, or would perform work under said contract to that amount; & when said company should have paid or secured the further sum of fifty thousand dollars, then your petitioner bound himself to advance the further sum of twenty-five thousand dollars in work as aforesaid; & when the company
92 should have paid or secured to your petitioner to within one hundred thousand dollars of whatever sum might be required to complete the company's road, then your petitioner obligated himself to complete the entire road as contemplated and specified in said contract, & was to run, control, and operate said road after being so completed, & be entitled to all the profits from the same as aforesaid, all which your petitioner was ready and intended to do; and

said company bound itself to make, execute, & deliver to your petitioner their good and sufficient mortgage with power of sale to secure said advancements in the same manner & terms as the mortgage already provided for in said contract. It was further agreed and said company was bound that its president & directors should do all in their power to aid your petitioner in obtaining labor, supplies, timber, &c., & to lend their cordial support & influence to facilitate the contractor in every way in the prosecution of the work; & said company was bound that in case your petitioner should refuse or neglect to perform all the covenants enumerated in said con-
93 tract, that upon said company's engineer certifying such fact to the president of said company, the president might, at his option, after careful investigation & due notice in writing to your petitioner, & after his refusal to remedy the evils complained of, declare this contract null and void.

Your petitioner avers and charges that when this contract was reduced to writing certain specifications were also reduced to writing and signed as aforesaid. Said contract and specifications were not signed in duplicate, but the company kept the originals and gave your petitioner merely a certified copy of said contract and specifications, which is incorrect, and your petitioner avers that said original contract and specifications as signed by your petitioner is now in the possession of said company, and notice is now given to said company to produce the same on the trial of this cause as evidence in the same, or secondary evidence of its contents will be introduced.

Your petitioner avers that he began work on said road under the terms and agreements of said contract during the month of
94 September, 1869; that he had on said road a sufficient force of hands, equipments, and supplies as bound to do under said contract, and that he kept such force at work faithfully performing all the terms and requirements of said contract, and was able and fully intended so to do until said road was completed, and not having received notice or intimation of dissatisfaction on the part of said company he believed said company fully satisfied with his work.

Your petitioner further avers and charges that on or about the 26th day of March, 1870, your petitioner received a letter through the post office at Houston, Texas, dated Waco, March 23d, 1870, and signed E. L. Heriot, ch. engineer, which said letter is hereto attached, marked "B," and made a part of this petition, which said letter was accompanied by a copy of a resolution passed at Waco March 18, 1870, by the board of directors of said company, and an order from J. T. Flint, the president of the said company, to E. L. Heriot, ch. engineer of said company, certifying that the copy was correct, and to be observed by said engineer, a copy of which
95 said resolution is hereto attached, marked "C," and made a part hereof. Said resolution was in effect an order that your petitioner put one hundred hands at work on said road within fifteen days from date of said resolution, and to keep that number con-

stantly at work, and a failure so to do on the part of your petitioner would be considered a violation of said contract.

Your petitioner further avers & shows that on the 2d day of April, 1870, he received a telegram from J. T. Flint, president of said company, dated 2d day of April, 1870, which telegram is hereto attached, marked "D" & made a part hereof, which said telegram was signed by said president, & in effect declared the entire contract between your petitioner & said company as aforesaid null & void, & stated that your petitioner would be no longer recognized as a contractor on said road.

Your petitioner further avers that on or about the 6th day of April, 1870, after the receipt of said letter, telegram, & resolution as aforesaid, at Calvert, Texas, at which time & place your petitioner
96 met said J. T. Flint, who was then president of said road & acting as such president, and during which interview your petitioner complained to said president that all said acts of the board, chief engineer, & himself were illegal & void, & doing a great wrong to your petitioner; and at the same time and place your petitioner demanded of said president to point out wherein said contract had been violated by your petitioner, & if it had been violated in letter or spirit, to then & there proceed to make complaint through the proper officer, & to follow out the provisions of said contract; & your petitioner offered to execute a new bond, in a greater penalty, if said president required it, but said president answered nothing, and left your petitioner without showing any violation, or without giving notice as required by said contract; & further, said president went immediately on the line of said road, and to the employees of your petitioner, & notified all persons on said road that your petitioner would be no longer recognized as a contractor, & that all work done on said road thereafter was in the direct employ of said company, & thereby forcibly, illegally, & wrongfully took possession of your petitioner's said work & the said line of road from Bremond
97 to Waco, Texas, & all the premises, surveys, & lines as specified & understood in said contract & the specifications thereto attached, & said president then forcibly, & still does to this day, prevent your petitioner from carrying out the letter, spirit, or terms of said contract.

Your petitioner avers that at the time of the said forcible entry of said president he had contracts perfected and in negotiation for a larger number of workmen to go on the line of said road than was called for by said resolution, and that he had supplies purchased to subsist said workmen for two months, a part of which was then at Calvert; all which he notified both said president and said chief engineer, and then and there at said interview as aforesaid notified said president that he was able, prepared, and expected to go on to complete said contract.

Your petitioner avers and charges that he has been greatly wronged and damaged by said illegal and forcible acts of said company through its president and board of directors in this: that there is due

and owing to your petitioner from said company the reserved fifteen per cent. which said company retained out of each monthly payment or such monthly payments as said company had made to your pe-
98 titioner, amounting in the aggregate to about three thousand dollars, and there is due and owing and unpaid to your petitioner from said company the sum of seven thousand dollars for work and labor done and performed on said road at the instance and request and for the benefit of said company, under said contract, all which sums your petitioner has often requested said company to pay, but said company has wholly failed, refused, and neglected to pay the same or any part thereof, to the damage of your petitioner twenty thousand dollars.

Your petitioner further avers that he has been greatly damaged in this: by said forcible and violent breach of said contract he is prevented from completing the same, thereby wrongfully depriving him of all the profits, advantages, and benefits that would have accrued thereunder, to wit, the profit upon excavating in common earth or clay, which would have been about twelve and one-half cents per yard; the profit upon excavating in hard pan as specified in said contract, which would have been about twenty cents per yard; the profits in excavating in solid rock,
99 which would have been about fifty cents per yard; the profits in grubbing, which would have been about two dollars & fifty cents for each one hundred feet; the profits in clearing, which would have been about two hundred dollars per mile; the profits on the cross-ties, which would have been about twenty-five cents each; the profits on surfacing, which would have been seventy-five dollars per mile; the profits upon laying the track, which would have been about three hundred dollars per mile, all which said profits would have accrued to your petitioner, and were in contemplation and understood by the parties when said contract was entered into through the payments to be made by said company, and were to be paid in the legal coined money of the United States of America.

Your petitioner further avers and charges that he has been greatly damaged in this: the loss of the profits to be made by running said road after and as said road was being constructed as specified in said contract. Your petitioner avers that the distance from Bremond to Waco, both in Texas, is about 42 miles, and said road was to extend for that distance between these points, and passes through as rich a portion of the country as any in Texas, and the carrying produce down and bringing freight back, as well as passengers both ways, would have given to your petitioner a large profit, for said profits were understood to accrue to your petitioner without account further to said company, the said profits not being *as* intended as pay-
100 ment to your petitioner, but an inducement to enter into said contract. And further, your petitioner had the right, under said contract, to build the bridge across the Brazos river, necessary to said company upon which to cross their cars; and that upon said contract he would have made a large profit, because such a bridge as

would be strong enough and safe enough for said company would cost about two hundred thousand dollars in the legal coined money of the United States of America, all which said profits in the construction of said road, with the profits of running the same for the use of the public, and building said railroad bridge, and including what is due and owing your petitioner as aforesaid, would amount to about one hundred and fifty thousand dollars, in the aggregate, of the legal coined money of the United States.

Your petitioner further avers and charges at the time and place hereinbefore specified he entered into a written contract, with specifications, which contract was substantially as the copy hereto attached, marked "A," and for the terms, specifications, and considerations of the same reference is made to the preceding part of this petition and
101 said copy, and further that your petitioner in good faith entered upon said contract in September, 1869, and expended large sums of money in procuring a commissary and working outfit with which to carry out said contract, and that he faithfully performed and discharged all his agreements and promises in said contract, and was able, competent, and prepared to carry out said contract to completion, and was at all times ready and willing to accede to any reasonable request of said company about said work on said road under the contract, and had no notice of dissatisfaction on the part of said company.

Your petitioner avers and charges that on or about the 2nd day of April, 1870, John T. Flint, acting as president, and in his said official character as such president of said company, did maliciously, fraudulently, and illegally, with the intent and purpose to wrong, defraud, and injure your petitioner, publish or cause to be published in the public newspapers of the state of Texas having a circulation in Galveston, Houston, and country on the line of said road, a notice or advertisement, a copy of which is hereto attached, marked
102 "E," declaring said contract null and void and notifying the world that your petitioner would be no longer recognized as contractor, which notice said president had no authority to give, not being provided for in the contract, and that the publication of the same had the effect to break up contracts your petitioner had made for labor and caused great dissatisfaction among the workmen then on the line of the road, and as your petitioner was absent from works attending upon his wife, who was very sick at the time, parties believing that your petitioner would be greatly damaged and broken up caused attachments to be issued and levied upon his outfit and supplies upon the line of the road, greatly to his damage, all which acts of the said president the said company afterwards ratified; and your petitioner further avers that on or about the first of April, 1870, John T. Flint, who was then president of said company and then and there acting in his official character as president of said company, did maliciously, fraudulently, and forcibly enter and take possession of the entire line of said road from Bremond to Waco, both in Texas,
103 and did then and there forcibly, fraudulently, and illegally reject, dispossess, and evict your petitioner from the premises,

surveys, and lines as specified and understood in said contract, and as said president took forcible and wrongful possession of said works, upon which petitioner had a large force of hands at work under said contract, and notified all persons that said company had declared said contract of your petitioner null and void, and ordered all workmen to look to said company for their pay in future, all which acts were afterward ratified by said company.

Your petitioner avers that by said malicious, forcible, and fraudulent acts of said company, that he has been greatly damaged, wronged and defrauded in this: said company owe your petitioner a large sum of money for work and labor done and performed at their request and for the benefit of said company, amounting in the aggregate to *to* twenty thousand dollars, which said company fraudulently and illegally refuse and neglect to pay to your petitioner, and further, he has been fraudulently and wrongfully prevented from com-
104 pleting his contract, which he was amply able to do, and has been defrauded of all the profits, benefits and advantages arising from the construction of the same, as particularly enumerated heretofore in this petition; the operating said road for the public for hire as agreed in said contract as aforesaid; the profit in constructing the bridge across the Brazos river for said company as aforesaid, and that by said illegal, fraudulent and malicious acts of said company your petitioner has been damaged in his character, reputation and standing among business men, because said acts have been done publicly, through the public newspapers and otherwise, and was known at Galveston, Houston, Calvert and Waco, among both friends and strangers, and the said president of said company further aggravated these acts of said company by a total failure and refusal to record said contract, and as he promised to do, therefore your petitioner had no means by which to refute the bad effects upon his character and reputation, and is now forced to the tedious and expensive recourse of a suit at law, & as his business and avocation is that of
105 a railroad and other contractor, he is greatly damaged thereby; and further, that your petitioner has been put to great expense in trying to arrange a proper settlement with said company, and has finally been forced to expend large sums for attorneys' fees and costs in litigation, and will be obliged to expend more to the same end, all caused by said company's fraudulent acts; all which sums for amount due and unpaid your petitioner for work done and his said several damages amount to the further sum of one hundred and fifty thousand dollars in the aggregate in the legal coined money of the United States.

Your petitioner further shows and charges that it was understood and agreed by said company, and so specified in said contract, that all sums of money due from said company to your petitioner should constitute a lien and mortgage upon all road-bed, superstructure, lands, franchises, taxes, and property of said company until paid; and it was agreed to execute notes and mortgages for the sums, but

said company has failed and refused to execute said notes
106 and mortgages, and it was further agreed that if said company violated the said contract that then all damages, losses, and injuries should as well become an incumbrance and lien to the postponement of all other liens and mortgages upon said road, land, franchises, &c., of said company; and your petitioner avers that said sums of money are due and unpaid from said company, and that they have grossly & fraudulently violated the letter, spirit, and intent of said contract; therefore all said sums of money & all such damages, injuries, & losses of your petitioner constitute a lien & incumbrance upon said road-bed, franchises, &c., of said company until paid and discharged by said company.

Your petitioner further avers that John T. Flint is president of said company & D. T. Chamberlin sec'y & treasurer, & and that the principal office of said company is at Waco, McLennan county, Texas, and that your petitioner is informed & believes & charges that the legislature of the state of Texas, now in session, has or
107 will change the name & style of said company & otherwise amend their charter.

In consideration of the premises and the foregoing averments, and that justice may be done to your petitioner, prays that citation may issue according to law, requiring said company to answer your petitioner. And that upon final hearing he may have judgment against said company for his said sums of money due & unpaid, his just claims, demands, and damages as aforesaid, and for all costs expended in this behalf; and that said contract may be and all sums for work and labor performed and unpaid your petitioner, and all damages, losses, and injuries to your petitioner, be as well adjudged a lien and incumbrance upon said company's road-bed, land, franchises, rights, taxes, and property whatsoever, whether under the name of the Waco Tap Railroad company, or any other name, or by any grant, gift or right, and that your petitioner have his decree for foreclosure of such lien, or if that he cannot have, then he
108 have execution for the same, and for such other and further general or special relief and assistance as he is entitled to in law or equity; and your petitioner will ever pray, &c.

SPEIGHT & McKENNEY,
for Shirley.

"A."

Exhibit A is a copy of the contract between T. M. Shirley & the Waco Tap Railroad company, which is set out in full on page 22.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R. company; petition; filed July 16th, 1870; D. F. Davis, clerk D. C., McL. co., by Jno. L. Dyer, dep'y; Speight & McKenney, atty, pl'ff.

109 *Supplemental Petition.*—Dec. 16, '72.

District court, McLennan county, December term, 1872.

T. M. Shirley
vs. } 1776.
Waco Tap Railroad.

And now comes the plaintiff in the above numbered and entitled cause, and after leave of court first had and obtained files this his supplemental petition and shows unto your honor that since the institution of the suit the def't has encumbered all of its real and personal property, rights, franchises and privileges to the Houston and Texas Central Railway company of Texas, with the principal office at Houston, Texas; and that said railway company by its authorized agents and employees are now in full and complete possession and exercising control over all the property of every kind of def't, and that said def't has executed a deed of trust on all its property for the benefit of said railway company, and that by reason of said acts of def't your petitioner will be forced to future and vexatious litigation to clear the clouds and encumbrances from said property which is subject to the judgment of your petitioner.

In consideration of the premises, your petitioner prays that
110 citation be issued by the clerk of the said Houston & Texas Central Railway company, and that it be made a party to this suit and to make answer hereto; and petitioner will ever pray, &c.

SPEIGHT & McKINNEY.

(Endorsed:) 1779; T. M. Shirley *vs.* Waco Tap R. R.; supplemental petition; filed Dec. 16th, 1872; D. F. Davis, clerk; by Jno. L. Dyer, dep'ty; Speight & McKenney.

111 *Supplemental Petition.*—Dec. 17, 1872.

District court, McLennan county, December term, 1872.

T. M. Shirley
vs. } 1779.
Waco Tap R. R. Co.

And now at this term of the court comes the plaintiff and files this his supplemental petition, and for further cause of action says, that since the institution of this suit, to wit, on or about the 10th day of June, 1871, the defendant made, executed, and delivered to the Houston & Texas Central Railway company their certain obligations in writing known as bonds, whereby the defendant agreed to pay to the Houston & Texas Central Railway company the sum of six hundred thousand dollars, and for the further security for the payment of said bonds the defendant executed a certain deed of trust, which was duly recorded in McLennan county on the 22d of October, 1871, for the benefit of said Houston & Texas Central Railway company

in the sum of said six hundred thousand dollars, and under the terms of said deed of trust all the real and personal property of what-
112 ever nature may be sold by the trustees nominated in said deed, on the 1st day of January, 1873, to the highest bidder, and that said bonds and deed of trust is now a lien and encumbrance on said real and personal property of defendant; and that at this date the said Houston & Texas Central Railway company is now in complete possession and control of all the real and personal property of said defendant; and your petitioner is informed and believes and charges the fact to be that under the provisions of said deed of trust the trustees nominated in the same will sell to the highest bidder at Houston, Texas, all the real and personal property, rights, and franchises of said defendant, and leave it wholly and hopelessly insolvent.

Your petitioner would further show that when the contract, which is the basis of this suit, was executed between your petitioner & def't the original was left with said def't, and your petitioner took merely a copy of the same for his guidance, & that said def't agreed to have the original contract duly recorded in McLennan county, Texas, & that during the continuance of the said contract your peti-
113 tioner was in possession & control of the road-bed and right of way of said def't, carrying out his contract in good faith; but when the def't ejected your petitioner from his said possession & control, as aforesaid, your petitioner discovered that said contract had never been recorded as promised by def't, & your petitioner repeatedly requested & urged def't to have the same recorded, but def't failed & refused to have the same properly recorded as had been promised, & said def't did not have the same recorded until after said June 10, 1871; and your petitioner could never get possession of said original *the* he might record it, & that therefore the execution of said bond & deed of trust are prior in date to the record of said contract between your petitioner & def't.

And petitioner further shows through the acts of defendants in combination with the Houston & Texas Central Railway company, & by the use of means your petitioner could not prevent, the said railway company has only such notice of your petitioner's rights as is given by the institution of this suit at a date prior to the mak-
114 ing of these bonds & deed of trust.

Your petitioner further shows that the basis of said bonds and deed of trust as aforesaid is the contract on the part of the said railway company to complete and equip the road of def'ts, which said contract was to extend to October, 1872, now just past, and that there has been no time since the institution of this suit until the said month of October last past that your petitioner could make the said railway company a party hereto, because said contract was incomplete and might never be completed so as to give said railway company any rights adverse to your petitioner, but that now said contract is complete, and the def't soon to be sold out as aforesaid, and the legal title to def't's property upon which your petitioner claims

an equitable lien in his original petition will pass definitely and absolutely to said railway company or to others. The premises considered, your petitioner prays that the Houston & Texas Central Railway company, a corporation chartered by the legislature of the state of Texas, and having its principal office at Houston, county
115 of Travis and state of Texas, be made a party hereto, and that a citation issue in form of law, to the end that your petitioner's rights may not be jeopardized by the combinations, acts, and collusions of def't and said railway company as aforesaid, and that all questions at issue, and that all the rights of parties in interest may be definitely settled in this one action; and further, that your petitioner may be protected from further and vexatious litigation with said railway company when he shall have obtained a judgment against the defendant, and for such other and further general and special relief as petitioner may be in law or good conscience entitled to; and will ever pay.

SPEIGHT & McKENNEY,
for Shirley.

(Endorsement:) T. M. Shirley *vs.* Waco Tap R. R. Co.; 1779; supplemental petition; filed Dec. 17th, A. D. 1872; D. F. Davis, clerk, by Jno. L. Dyer, dep'ty; Speight & McKenney, for pl'ff.

116 *Amended Petition.*—Dec. 1, '74.

District court, December term, 1874, McLennan county.

T. M. Shirley
vs.
Waco Tap R. Road. } No. 1779.

And now comes the plaintiff in the above numbered and entitled cause, and after leave of court amends his original petition, and by way of replication answers def't's several answers and amendments. Your petitioner specifically and specially denies all and singular the charges and allegations of fraud and deceit as charged by def't, and especially that he ever influenced or endeavored to influence the def't in any way as to his own solvency or otherwise or his bondsmen, and that the def't acted on its own judgment in all its transactions with your petitioner; your petitioner avers that although proceedings were instituted in bankruptcy against your petitioner, that nothing further was ever done in the matter than filing the petition, and that no judgment was ever entered on the same.

Your petitioner avers that the def't was the prime mover
117 and instigator and the secret cause of the issuance of attachment by Byrnes, as pleaded and set out by def't in his answers; and further, that on the trial of said cause, through the neglect and fault of his attorneys, your petitioner was unable to show the true condition of things in said cause; but def't spread reports on the works of your petitioner and among his hands on the road that

the def't was about to take the contract away from your petitioner, and urged and influenced Byrnes to sue out the attachment to save petitioner's outfit for him, when in fact petitioner owed Byrnes nothing, and when def't well knew and intended that the levy of the attachment would cripple and break up petitioner so that def't would have a plausible excuse for violating the contract herein sued on, and petitioner now charges that it was begun and accomplished by defendant for the sole purpose of wronging and defrauding petitioner out of his just rights under the contract and was part of the said general enterprise. And further, that since the def't declared this contract void, and since the institution of this suit, the def't has
118 mortgaged and sold all its right, title and interest in and to its road, road-bed, &c., and has sold and transferred all its property, both real and personal, to other parties with a view and intent to hinder, delay and defraud your petitioner of his just debt and damages, and that now def't is remediless and will be defrauded of his rights by the unlawful and corrupt acts of defendant, and such as your petitioner could not prevent and from which he ought not to suffer.

Your petitioner avers that when the contract between him and def't for building the railroad as described in petitioner's original petition was under discussion and being consummated, and its provisions agreed upon, it was well understood by all parties that the def't had no capital or credit beyond its naked paper charter, the subscriptions to its capital stock and tax in McLennan and Falls counties, and at that time in each of these counties there was formidable opposition to the same and the collection of the tax, and efforts were being made to restrain by law the collection of the tax, all which said assets were doubtful and precarious upon which to base a contract to build the road, and of themselves not sufficient in amount to accomplish that end, and it was expected that your petitioner would get money on his contract so as to be able to
119 build and equip the road; and def't well knowing its inability to meet the engagements of the contract out of its assets, provided for the execution of the mortgages as specified in said contract. In view of these facts, and all parties agreeing to and admitting them, and that your petitioner had no security from the def't, until the sum of twenty thousand dollars was reached, and to provide the faithful performance of the contract by the def't, it was agreed by the parties that the contract itself should be a lien for all work, labor, profits and damages that should accrue to your petitioner from the day he should begin work until better secured; and further, that the only security the def't could then give for the faithful performance of the contract on its part was a lien on its road, bed, franchises, etc. The def't then agreed to embody in said contract a provision that your petitioner should be secured against all loss and damages, and be secured in his profits by a full, complete and prior lien on def't's road, etc., in the event def't failed to comply or wrongfully terminated the contract. The understanding of your petitioner and def't being

that your petitioner should be secured all his present
120 and fair prospective profits on the accruing of such an event as is complained of in his original petition herein, and was so expressed in the memorandum of the terms of the contract then being discussed. And thereafter, when all the terms of the contract were agreed on and stated in said memorandum, defendant undertook to employ persons learned in the law to draw a written contract in proper form, to express the terms as agreed on in said memorandum, since which time your petitioner has not seen said memorandum. And your petitioner, having full faith and confidence in defendant, took no further precaution in the matter, but trusted to defendant; and thereafter defendant produced and submitted to your petitioner the written contract sued upon, and asserted that it contained the terms as agreed and understood in said memorandum; and your petitioner fully believing it to be true, and that it did fully and completely secure him in any event, signed said contract, but kept no copy of the same, and did not have a copy until some time after, and then not an official, but mere office copy, to guide him in the work; but began and prosecuted the work until defendant fraudulently disrupted the same, fully believing and has always understood and construed the contract as so securing him, and so has the
121 defendant understood the contract. Your petitioner therefore prays that he may be allowed, on the trial hereof, to explain said contract in the light of the surroundings when it was made, and to explain the intentions of the parties hereto at the time it was entered into, and the objects to be accomplished by said contract, so that said contract may be reformed to fully express and carry out the intentions of the parties at the time, and to secure petitioner all his rights and security as was really intended when the contract was made, but which, by a mistake, was not so fully expressed and incorporated into said contract, as shown by the memorandum and undertook by the parties; and your petitioner avers that said memorandum was taken possession of by the defendant at the time, and your petitioner has not seen the same since, nor had possession of it, but it is in possession of defendant, and your petitioner asks that defendant may be ordered to produce the same on the trial hereof, or your petitioner be allowed to prove its contents.

Your petitioner avers that the originals of the exhibits to his original petition are in the hands of the defendant and his possession, and he is now notified to produce them on the trial
122 hereof, or secondary evidence of their contents will be introduced. And your petitioner prays as before, and for such other and fuller relief as he may be entitled to.

E. A. McKINNEY &
THOS. HARRISON,
For Plaintiff.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R.; filed Dec. 1st, 1874; D. R. Gurley, clerk D. C. McL. co.; by Chas. R. Beaty, dep.; amended petition, McKinney & Harrison.

123 *Amended Petition.*—Ap'l 22d, 1876.

District court, McLennan county, May term, 1876.

Thomas M. Shirley
vs.
Waco Tap Railroad Company. } No. 1779.

To Hon. T. B. SAUNDERS, judge, &c.

Your petitioner at this term of court, after leave, comes & amends his original petition in the above numbered and entitled cause, and says:

That long after the filing of his said original suit the Houston & Texas Central Railway company, (hereinafter called the Central,) a body politic & corporate, created by act of the legislature of the state of Texas by an act entitled "An act to establish the Galveston and Red River Railway company," approved March the 11th, 1848, and the several acts supplemental thereto and amendatory thereof, having its principal office and place of business in the city of Houston, county of Harris & state of Texas, and of which Wm. E. Dodge is president, and a non-resident of the state aforesaid, and F. A.
124 Rice is treasurer, and A. S. Richardson is secretary, with their residence in the county & state last aforesaid, where is situate the principal office & place of business of said Central, and after full & complete notice of all your petitioner's rights under his contract with the Waco Tap Railroad company, (hereinafter called the Tap,) as set up in his original petition, and with full notice of the filing of his said original suit, did enter into a contract in writing with the said Tap to grade, complete, and furnish Tap from Bremond to Waco; that among other things provided for in said contract, the Central obligated itself to complete & furnish said Tap to Waco by the 1st day of June, 1872; and in consideration of such completion the Tap executed its bond for six hundred thousand ($600,000) dollars to the said Central, & payable on the first day of January, 1873, and secured the payment of said bond by a deed of trust on the road, road-bed, franchises, &c., of said Tap, and in pursuance of said contract the Central at once began the construc-
125 tion & furnishing of said road belonging to said Tap, but under said contract said Central demanded as a security for a part of said contract, but to revert to said Tap, the following property and land; 150 acres of land in Falls county, the one-half interest in sixty-two acres of land at Martin, Falls county, a tract of land within the corporate limits of the city of Waco of 20 acres, all which said property and land has long since passed into the hands of the Central to its own use & benefit, and did not revert to said Tap; and said Tap further bound itself not to issue more shares of its capital stock without the consent of said Central; that on or about the 31st day of October, 1871, a supplemental contract was made & entered into between said Tap & Central which, among other things, required of the Tap to turn over & deliver to said Central one hundred thousand

dollars in coupon bonds of the city of Waco, then the property & part of the assets of the Tap, the net proceeds of all its remaining notes, accounts, claims for taxes & other demands; and the Tap was to render an account of its liabilities to *to* the liquidation of
126 which these assets might be applied, & to issue and deliver to said Central certificates of stock in said Tap for one hundred thousand dollars. Your petitioner avers that all the above assets & stock was paid and delivered by the Tap to the Central, & that the account of the liabilities of the Tap was given to the Central, and among others the debt of your petitioner was given for the use & benefit of the said Central, and at this time the said Central had absorbed and appropriated all and singular the entire property of the said Tap, and still in addition held the deed in trust for the said bond of $600,000; that immediately after the transfer of the stock as aforesaid the Central, by virtue of said stock, elected a majority of the board of directors of the Tap from the members of its own directory, so from that date the Central assumed complete control & ownership of Tap; and thereafter the Tap became in fact & management a part of the Central; that thereafter, on the first Tuesday in February, 1873, the said Tap was sold out under said deed in trust and the Central became the purchaser; that thereafter, by an
127 act of the legislature of the state of Texas, approved May the 24th, 1873, the said Tap was merged and consolidated in the said Central, and that thereafter the said Central became in law, so far as you petitioner's rights are concerned, the Tap.

That some time after said act of merger, but at what precise time your petitioner cannot now ascertain but will set out when known, the directors of the Central, or a majority of them, came to Waco, the former principal or home office of the Tap, and formed themselves into what they called the board of directors of the Tap, and after so formed, granted to the Central or pretended to grant all the lands granted by or that the Tap had the right to demand of the state of Texas by reason of the building and completion of said Tap as provided for by law, amounting to about one half-million acres of land, to all which said grant or pretended grant your petitioner then and and there protested in writing. Your petitioner avers that the said Central has converted and appropriated all of the above mentioned land, property, and assets to its own use and benefit and has en-
128 joyed and is now enjoying the full proceeds and value of the same, besides claiming the title to and in possession of and deriving all the profits of said Tap. And further, that all of the above and foregoing acts and doings of the Central and Tap were in direct fraud of his rights as a creditor of said Tap, and that the said Central intended by its acts and illegal proceedings to wrong, injure, and defraud your petitioner. He avers that he is now and was at the time of the breach of his contract by the Tap, and at the time of his first contract with the Central, the principal if not the only creditor of the Tap, and that at the time and before the making of the first contract he notified the board of directors of the Central of the pen-

dency of his suit against the Tap, of his rights thereunder, and that he intended to vigorously prosecute the said suit and to protect his rights under his contract, that said sale under said deed of trust was null and void and fraudulent so far as he is concerned, because the said Central by means of its controlling influence on the board of directors of the Tap prevented said Tap from taking any steps and making any effort to
129 pay the said bond, and therefore was able to fraudulently buy the said road in, at its own price, using its power and influence thereby to defraud your petitioner out of the only security he had, and the last remaining property belonging to the Tap, as the Central had previously defrauded the Tap out of its other assets. And further, by said act of merger and the acceptance of the same by the Central, it became liable to your petitioner to pay any judgment he may recover against the Tap, under his contract with it in this suit; that the said Central has received from the Tap, in lands, taxes, stock, Waco city bonds, subscriptions, notes, rights of way, depot grounds, franchises, and in the merger and general fraudulent appropriarion of the said Tap to its own use and benefit, much more, many times more in value than it ever paid out for or expended on said Tap, exactly how much or nearly how much it is impossible for your petitioner to state, as the said Central has never made any exhibit to the Tap or any one else, nor has ever pretended to
130 account for a dollar of the assets or corpus of the Tap, but through its influence as stockholder has always controled the directory of the Tap, to its own nefarious designs, and has defrauded your petitioner out of the only security he could have for his demand against the Tap.

Your petitioner prays in addition to his prayer in his original petition that the Central be made a party hereto and cited in terms of law, that on final hearing hereof he have his judgment against the said Central as well as the Tap, for his said debt, damages costs and interest; or if he cannot have that, then that the said Central be ordered to return to your honor a full and complete exhibit or account showing what it has paid out and expended for said Tap, and what it has received from said Tap and what has become of said assets of the said Tap, and if it fails to do so, to be adjudged liable for your petitioner's said debt and damages; but if such showing is made, then that your petitioner's right to said assets or any excess over what said Central has paid out be adjudicated and your petitioner's rights therein be declared; or if not entitled to that, then that the said Central be declared a subsequent incumbrance to your
131 petitioner on the said Tap, and that said sale under said deed of trust be declared void, and the said road, road-bed, franchise, &c., of the Tap be declared liable to your petitioner's judgment in this suit; or if this he cannot have, then that the lands granted to the Tap and pretended to be assigned to said Central be declared subject to your petitioner's judgment, and that the Central account for the same to your petitioner. And for such other further and ful-

ler orders and relief as your petitioner may be entitled to in law or equity; and will ever pray, &c. And your petitioner now gives notice to said Central to produce on the trial hereof the two contracts hereinbefore mentioned, the deed of conveyance to it under said sale under said deed of trust, the order or pretended transfer of said land by said Tap, as all these are in possession of said Central, or secondary evidences of their contents will be offered.

E. A. McKENNEY &
THOS. HARRISON,
For Shirley.

(Endorsement:) No. 1779; T. M. Shirley *vs.* H. & T. C. R W. Co.; amended petition; filed April 22d, 1876; Cha's R. Beatty, cl'k D. C. McL. co.; McKinney, Harrison.

132 *Amended Petition.*—Dec. 21, '77.

District court, McLennan county, November term, 1877.

T. M. Shirley
vs.
Waco Tap Railroad Company. } No. 1779.

And now comes your petitioner at this term, and after leave amends his original amended petitions, and says that after def't Tap disrupted the contract with your petitioner as averred and charged in his original petition, and evicted your petitioner from the line of road of def't Tap said defendant undertook and prosecuted the work of constructing its own road, until about July, 1871, when said def't Tap combined and confederated with def't Central to hinder, delay and defraud your petitioner out of his said sums of money due him from said def't Tap, and his said damages, interest and demands, as set up and charged in his original petition. And the said def't Central combined and confederated with said defendant Tap to hinder, delay, and defraud your petitioner from collecting or recovering his debt, damages, interest and demands as set up in his said original petition, and in pur-
133 suance of said fraudulent combination, deft's Tap and Central made and entered into the said contract as described and set up in your petitioner's amended petition, filed April 22d, 1876; the object as expressed on its face is to construct and complete def't Tap's said railroad, but your petitioner avers that def't Central made and entered into said contract, and the sole inducement thereto, on the part of said def't Central, was the determination and intention to finally convert, absorb, and fraudulently acquire the entire property, rights, and franchises of said defendant Tap, regardless of the rights of your petitioner and all other persons. And in the further prosecution of said fraudulent intention and design to wrong and defraud your petitioner, these def'ts made and entered into a supplemental contract on or about the 31st October, 1871, as

set up and averred in your petitioner's said amended petition, and under said supplemental contract said def't not only acquired all the property of def't Tap not covered by the deed in trust
134 provided for in said original contract, but also acquired coupon bonds of the city of Waco, to the value of one hundred thousand dollars, a municipal corporation within the limits of which said def't Tap terminated its road, and said bonds had accrued to said def't Tap by means of the subscription to the capital stock of the def't Tap by the city of Waco, and, in furtherance of its original fraudulent intent, def't Central, by or through the influence of the officers, members or directors of def't Tap, procured the assignment of a large number of certificates of shares of capital stock in said def't Tap to itself by the holders of the same, and for which no consideration was paid or promised to be paid, but was obtained by def't Central for the purpose of maintaining control of said def't Tap, by electing a majority of its directors by means of said shares of capital stock, as it intended to do at the date of the 1st contract, as said contract provided that no more capital stock should be issued without the consent of said def't Central, but failing to obtain a majority of the capital stock already issued by def't Tap, def't
135 Central in making the supplemental contract, provided that two thousand shares of the capital stock of said def't Tap of the face value of one hundred thousand dollars should be issued to it, which was done by def't Tap, and thereafter on or about November, 1871, def't Central, by means of said stock so assigned by individuals and issued by def't Tap, elected a majority of its own directors to be directors of def't Tap, and thereby obtained the full control and management and possession of the property, rights, and franchise of def't Tap, as it had originally intended to do.

Your petitioner avers and charges that said first or original contract and second or supplemental contract, the making and executing said deed in trust as provided for in said contract, the issuance of said shares of capital stock in def't Tap to def't Central, as well as all and singular the provisions of said contracts, were null and void from the beginning, because both def'ts, being corporations chartered by the legislature of the state of Texas, had no power or authority to make such contracts—the one to construct the road and the
136 other to employ for that purpose—because said contract is against public policy; because the same were made and entered into for the purpose of defrauding your petitioner, and did injure and defraud him.

That in the further prosecution of the fraudulent determination on the part of these def'ts, said def't Central procured, through the assistance of def't Tap, its officers or directors, the assignment to itself of the shares of the capital stock of the def't Tap, issued by def't Tap to the city of Waco as the consideration of the bonds heretofore spoken of, which said shares of capital stock also aided and assisted in enabling def't Central to elect a majority of its directors to be directors of def't Tap as aforesaid. And said def't Central,

in the further carrying out of its original fraudulent design to convert the def't Tap's road to its own use and benefit after it had elected a majority of its own directors as directors of def't Tap, then through its said directors took no steps, made no effort, but fraudulently and in breach of the trust in said directors, prevented any steps being taken or effort made to pay off
137 & discharge said deed in trust executed in pursuance of said first contract, but willfully & fraudulently made default in said payment, whereupon said trustees, P. W. Gray & B. A. Botts, at once, at its maturity, proceeded to sell the same at the city of Houston, Texas, under the terms of said deed, they being stockholders in said def't Central at the time; and at said sale W. J. Hutchins, who was a director in & vice-president of def't Central, and a director in def't Tap at the time of said sale, bought the road, road-bed, property, & franchise of said def't Tap, as described in said deed for def't Central, for the sum of four hundred thousand dollars, leaving still two hundred thousand dollars due to def't Central, said sale being made on or about the first Tuesday in February, 1873, as aforesaid. Your petitioner avers that said acquisition of the shares of capital stock from the city of Waco, and said sale and purchase under said deed in trust, were null & void in the beginning, because all parties being corporations, as aforesaid, def't Central had no authority to acquire the capital stock in any other railroad, under its charter; and def't Tap had no authority to sell itself & its franchise, & neither had def't Central to buy another railroad; because the same is against
138 public policy; because the same was done to injure & defraud your petitioner, & did injure and defraud him, and said sale was a nullity, because it was in fact no sale at all, being a sale by the def't Central to itself, and as well was the purchase by the Central, a purchase at its own sale.

Your petitioner further avers that after said purchase of def't Central by def't Tap said Central, on or about the 24th of May, 1873, obtained from the legislature of the state of Texas by means of false statement & fraudulent representations of ownership of def't Tap an act merging def't Tap into & to become a part & parcel of def't Central, which act was approved by the governor. Your petitioner avers that said act of merger does not change, vary, or affect his rights, and that it does not cure or legalize the aforesaid illegal, fraudulent, and oppressive acts & doings of def't Central, nor does it transfer the title of any property of the def't Tap to def't Central, or release any of the property of def't Tap from any legal or equitable claim your petitioner may have upon it, but merely nominates def't Central as the custodian of the property, rights, & franchises of def't Tap. Your petitioner further avers that after said act of merger, to wit, on or about the 24th of June, 1874, def't Central
139 caused its directors or a majority of them to assemble at Waco, where had been the principal office of def't Tap, & to form themselves into what they called the board of directors of the def't Tap; and after so formed, said directors proceeded to grant &

sell to def't Central all of the lands granted to the Waco & Northwestern Railroad company, which was the successor to the def't Tap by act of legislature of the state of Texas, approved the 6th day of August, 1870, some time after the filing of your petitioner's original petition in this cause, said land being about one-half millions of acres & reasonably worth one million dollars. The consideration was pretended to be the remaining two hundred thousand dollars still due def't Central by def't Tap as a balance unsatisfied of said deed in trust executed under said first contract. Your petitioner avers that said pretended transfer was & is a nullity from the beginning, because said directors of def't Central had no authority to act for def't Tap & there was no such legal being as def't Tap then in existenc, because if there was such a legal person as the Tap, of the gross inadequacy of price pretended to be paid for said lands, & because the stockholders of def't Tap never authorized such sale and transfer, because it was done in fraud of your petitioner's
140 rights, & did injure & defraud him.

Your petitioner avers that all the aforesaid acts & doings of def'ts Tap & Central from first to last are null and void in law & equity, as well for the reasons already assigned as because of the gross inadequacy of the price bid or pretended to be paid by def't Central at the sale under the deed in trust, said property so sold & purchased being reasonably worth a million & a half of dollars at the day of sale, and because all the said acts were ultra vires &, therefore, void.

Your petitioner now withdraws so much of his prayer in his amended petition, filed Ap'l 22d, 1876, as asks for an account from def't Central of what it has rece'd & paid out for def't Tap, & what has become of the assets of the def't Tap; and now prays, in addition to his prayer in his original petition and in connection with the remainder of the prayer of the said amended petition, that def't be adjudged and decreed to hold all the property, right, and franchise of def't Tap under the act of merger as custodian, and that the same be subjected to your petitioner's judgment or decree in the hands of def't Central, free & released from all claim or right of def't Central
141 through any of the aforesaid contracts, sales, or transfers, & that in default of the payment of said judgment, then your honor order the sheriff of McLennan county, or some other proper person, as a commissioner to sell all the former property of def't Tap, now held by def't Central as custodian, including the lands granted by the state of Texas, the road, road-bed, lands & property of def't Tap, under such orders as your honor may deem proper. If this he cannot have, that then he have his judgment against def't Central for his said debt, costs, interest & damages. And your petitioner now notifies the def't Central to produce on the trial of this cause, in addition to the notice in his said amended petition, all the books & records of the def't Tap or Waco & Northwestern Railroad company, all of the books & records of the def't Central as relates to the purchase & sale of def't Tap, the transfer of said lands, or in

any way relates to said def't Tap, as all these are in the custody of def't Central and beyond the control of your petitioner, or secondary evidence will be introduced of their contents.

E. A. McKENNEY &
THOS. HARRISON,
For P'ff.

(Endorsement:) No. 1779. T. M. Shirley *vs.* Waco Tap R. R. Co. Amended petition, filed Dec. 21st, 1877. Chas. R. Beatty, clerk, by E. W. Pew, dep'y. McKenney, Harrison.

142 *Amended Petition.*—Dec. 28, '77.

District court McLennan county, November term, 1877.

T. M. Shirley
vs.
Waco Tap Railroad Company. } No. 1779.

And now comes the pl't'ff in the above numbered & entitled cause, & after leave amends his original & amended petition and says:

That after your petitioner filed his original petition in this cause, & after the breach of his said contract, as set out & pleaded in his said original petition, def't Tap procured the passage of an act of the legislature of the state of Texas changing its name to that of the Waco & Northwestern Railroad company, approved August 6th, 1870.

That immediately after the breach of his said contract & eviction, as set out and alleged in his original petition, def't Tap took possession of the entire line of its said road from Bremond, Robertson county, to Waco, McLennan county, Texas, and at once assumed & exercised complete control of the entire line of its road, to the loss, damage, & injury of your petitioner, as set out in his original petition.

143 And def't Tap so continued so to possess & control the same until on or about the month of July, 1871, when def't Tap and Central combined and confederated to and with each other to hinder, delay and defraud your petitioner out of his said debt, damages and claim against def't Tap, and to fraudulently transfer and dispose of all the rights, property and franchises of def't Tap and def't Central further intended on its own part and for its own use and benefit, determined to absorb and fraudulently convert all the said rights, property and franchise; in fact, the entire body and existence of def't Tap into itself, regardless of law or equity or the rights of stockholders, creditors, or your petitioner.

And in pursuance of this fraudulent combination and determination on the part of these def'ts, they entered into the contract, of date about July, 1871, as set up and alleged in your petitioner's amended petition filed April 22d, 1876. By the terms of said contract def't Central was to complete and equip def't Tap's road on or

before the first day of June, 1872, in consideration of the sum of six hundred thousand dollars, and to secure the payment of which def't Tap executed a deed in trust to P. W. Gray and B. A. Botts, of
Houston, Texas, for the benefit of def't Central, said deed
144 conveying the road, rights, property and franchise of def't
Tap, and under its terms, if default was made in the payment of the six hundred thousand dollars by said def't Tap, then said trustees were to sell said property at Houston, Texas, and def't Tap obligated itself by said contract not to issue further shares of its capital stock, or sell the same without the consent of def't Central. That on or about the 31st of October, 1871, these defendants entered into a further or supplemental contract in writing, as alleged in petitioner's amended petition, which said supplemental contract, among other things, provided that def't Tap should issue to def't Central for its own use and benefit two thousand shares of the capital stock of def't Tap, of the value of one hundred thousand dollars; that def't Tap would assign and deliver to def't Central, to its own use and benefit, the bonds of the city of Waco to the amount of one hundred thousand dollars, the said bonds having been taken from the said city as the consideration paid for two thousand shares of the capital stock of def't Tap; and
def't Tap was to assign and transfer to def't Central for
145 its own use and benefit all the remaining notes, accounts,
claims for taxes, and all other demands, the assets of def't Tap then held by it, and also to render an account of the liabilities of said Tap; that at the time of making the original contract the def't Tap through its officers or the representative officer of the Tap agreed with def't Central to procure the transfer by the individual holders thereof of a sufficient number of the shares of the capital stock of def't Tap to give def't Central the control of the directory of def't Tap, but this agreement failing after the assignment of a large number of said shares by the holders thereof, after the making of the supplemental contract def't Central procured through the officers and directors of def't Tap the assignment by the city of Waco of its shares of capital stock in def't Tap, which with the shares issued to it by def't Tap and the shares assigned by individuals gave to def't Central a majority of the capital stock of def't Tap; that all and singular the stipulations of these two said contracts were fully carried out and perfected on the part of def't Tap, and that thereafter, to wit, on or about November 4, 1872, def't Central
by means of its shares of capital stock of def't Tap,
146 acquired as aforesaid, elected a majority of its own directors
and officers as a majority of the directors of def't Tap. Your petitioner avers and charges that all the above recited acts and doings of these def'ts in and about said contracts and the assignment of stock and election of directors were illegal, null and void; because both def'ts being corporations chartered by the legislature of the state of Texas, neither had the authority for so contracting; because said acts and doings were against public policy; because

the same were conceived and executed for the purpose of defrauding and injuring your petitioner, of whose rights def't Central had full, actual and implied notice before so contracting, and said acts and doings did injure and defraud your petitioner.

That the said road of def't Tap was completed and equipped and in running order to Waco, Texas, on or about October, 1872, and def't Central well knowing the illegality of said acts of these def'ts, def't Central, intent upon its original design to fraudulently convert the body of def't Tap, continued to use, control and manage the road of def't Tap, receiving and appropriating all the
147 revenues and profits of the same; and further, in pursuance of its original nefarious designs, def't Central by means of its control of the directory and officers of def't Tap, willfully and intentionally prevented any effort on the part of def't Tap to pay the said six hundred thousand dollars or any part of it, or relieve in any way or to prevent the default under said deed in trust, and no steps were taken or effort made by def't Tap to pay off, extend or release said lien under said deed in trust.

That on or about the first Tuesday in Febr'y, 1873, P. W. Gray & B. A. Botts, trustees, sold the property described in said deed in trust, & def't Central, through W. J. Hutchins, its vice-president, became the purchaser at the sum of four hundred thousand dollars, said property being well worth at said day of sale one & a half million dollars, & the trustees executed their deed of conveyance to def't Central thereafter.

Your petitioner avers and charges that the said sale & purchase were illegal, null and void; because both parties were corporations & their charters conferred no authority for such acts; because there was in fact no sale at all, as def't Central was selling to itself by
148 itself; because of the gross inadequacy of the price paid; because there was no necessity for said sale, but the same was brought about through the connivance & fraud of def't Central; because the same was in fraud of the rights of your petitioner, & did injure & defraud him, which def't Central well knew & intended. That after said fraudulent sale, on or about the 24th of May, 1873, def't Central, by false statements & deceitful representations, procured the passage of an act of the legislature of the state of Texas by which, so far as the legislature could lawfully effect it, def't Tap was merged, and thereafter constituted a part of def't Central; that after said act of merger, to wit, on or about the 24th of June, 1874, def't Central ordered a meeting of what was called the directors of def't Tap, & after the persons calling themselves directors were assembled, a majority of whom were directors of def't Central, they granted and conveyed to def't Central all the land & land certificates to which def't Tap, under its name of the Waco & Northwestern Railroad company, was entitled as a donation from the state of Texas, amounting in the aggregate to five hundred thou-
149 sand acres of land, well worth one million of dollars at that time, and the consideration pretended to be paid by def't

Central was the two hundred thousand dollars claimed by def't Central to be due under said deed of trust.

Your petitioner avers and charges that said act of merger does not and cannot cure the gross frauds and illegal acts of these def'ts, nor does it change, alter, or effect any of your petitioner's rights or remedies, but merely constitutes def't Central the custodian of the rights, property, and franchise of def't Tap, subject to the rights and claims of your petitioner. And further, that said act of the pretended directors of def't Tap was illegal, null, and void; because they had no authority to act; because said transfer was not authorized by the stockholders of def't Tap called for that purpose; because it was a sale by def't Central to itself; because of the gross inadequacy of the price pretended to be paid; because it was in fraud of your petitioner's rights and did injure and defraud him; because def't Central had no authority in its charter to make such a purchase; because it was against public policy, all which def't Central well knew.

150 Your petitioner avers and charges that since the said act of merger and pretended act of said directors, def't Central has become insolvent and is liable to be placed in the hands of a receiver at any time, and that a judgment against def't Central rendered at this time is comparatively worthless, and that at the date of said act of merger and at the date of said sale under said deed in trust your petitioner was the principal if not only legal creditor of def't Tap, and at either of those dates its property and franchise and lands were well worth one million dollars over and above all its just debts and liabilities.

Your petitioner now asks leave to withdraw and abandon his amended petition filed Dec. 21, 1877, and does now withdraw and abandon the same and substitute this amendment for and in the place of the same.

And your petitioner further withdraws all of his prayer in his amended petition filed April 22, 1876, after the prayer that def't Central be made a party and for judgment against def't Central, and in addition to the prayer of his original and amended peti-

151 tions and in connection with them prays that all the property, land and rights of the former Waco Tap or Waco Northwestern Railroad company be declared subject to his said judgment against the defendant Central primarily, and that the sheriff of McLennan county, or some proper person as a commissioner to be appointed by your honor, be ordered to sell the same, under such orders as may be proper to satisfy your petitioner'ss aid judgment, and if the same is not sufficient, then that he have execution over against defendant Central, and for such other orders and decrees as he may be entitled to in law and equity; and further gives notice to defendant to produce on the trial of this cause the said deed of trust hereinbefore mentioned, all the records, books, papers, and minutes of the late Waco and Northwestern Railroad company, including the engineer's estimate book, letter book, and secretary and treasurer's books; so much of the records of defendant Central as pertain to the

late Waco and Northwestern Railroad, or Waco Tap Railroad company; a list of directors and officers of defendant Central for the years 1871, '72, '73, '74, '75, '76; the conveyance by P. W. Gray and B. A. Botts, trustees, to W. J. Hutchins or defendant Central, or secondary evidence will be introduced on the trial hereof of their contents.

152 E. A. McKENNEY and
THOS. HARRISON,
For Plaintiff.

(Endorsement:) No. 1779; T. M. Shirley *v.* Waco Tap R. R. Co. Amended petition, filed Dec. 28, 1877; Chas. R. Beatty, clk. D. C., McL. co., Texas, by E. P. Pew, dep'ty. McKinney & Harrison.

153 *Amended Petition.*—Jan. 12, '78.

November term, 1877, district court, McLennan county, state of Texas.

T. M. Shirley
vs.
Waco Tap R. R. Company. } No. 1779.

And now comes the plaintiff, and, after leave, amends his original & amended petition, and says: That def't Tap a short time previous to the disruption of his said contract, through its officers or employees, combined and confederated with one John Byrnes, then living in Falls county, Texas, near pl'ff's said railroad works, and through said Byrnes, acting as pl'ff and setting up a false & fictitious claim against your petitioner for a large sum of money, procured an attachment to issue out of the district court of Falls county, Texas, on or about April 1, 1870, and had the same at once on or about April 1, 1870, levied by the sheriff of Falls county on a part of your petitioner's outfit and stores then on his said works as contractor; and def't Tap on or about said date declared your petitioner's
154 contract forfeited, and procured through the sheriff of Falls county and said Byrnes to have said outfit and supplies so levied on remain on said works, & were issued out to the men thereafter employed by def't Tap to carry on said work.

Your petitioner avers that he owed Byrnes nothing or but a very small sum at the date of said levy, & that def't Tap well knew that your petitioner owed him nothing or but a small sum, but for the purpose of having a seeming excuse to forfeit said contract, wilfully and fraudulently combined with Byrnes so to do; & your petitioner avers that after said levy, & after converting his outfit & supplies as aforesaid, said Byrnes was put in charge of def't Tap's said road as superintendent, & that he was afterwards given very profitable contracts in consideration of his said acts in procuring said illegal attachment; and def't Tap did these things wilfully, intending to

wrong, injure and defraud your petitioner, and did wrong, injure & defraud your petitioner, as set up in his original petition. Your petitioner avers that the records of the district court of Falls county have been since said date destroyed by fire, and that therefore he cannot give a more particular description of
155 said attachment. And further amending his original amended petitions, he says: That after def't Central had failed to obtain the transfer of sufficient number of shares of the capital stock of def't Tap, which, with the number to be issued under the supplemental contract, it was expected would be a majority of such stock after such failure, through the assistance and connivance def't Tap and its officers and employees; and def't Central, being determined to gain and keep control of def't Tap, entered into a contract or agreement with the city of Waco for the transfer of the shares belonging to said city, which amounted two thousand shares of the value of one hundred thousand dollars; said contract was in writing, and dated on or about the 21st day of October, 1871, and was signed by B. F. Harris, then mayor, and D. S. Wallace, then sec'y, of the counsel of the city of Waco, and by A. Groesbeck, vice-pres. and acting pres., and A. S. Richardson, sec'y of def't Central, and sealed with the respective seals of said city of Waco and def't Central.

Your petitioner avers that said contract was made for no
156 other purpose than to get possession of said shares to enable def't Central to control and direct the affairs of def't Tap, so that no effort could be made to redeem def't Tap's road or prevent a sale under said deed in trust and to get rid of the largest stockholder in said def't Tap. That def't Central never paid a dollar's consideration for said stock to the city of Waco, and said stock was valueless to def't Central, and was only obtained to further the design to fraudulently convert the property of def't Tap and to wrong, injure, and defraud your petitioner, and that by means of said shares of stock so obtained def't Central did obtain a majority of the capital stock of def't Tap, and through said stock was enabled to fraudulently convert said property of def't Tap, and did so convert it, to the great injury of your petitioner as before alleged. Said contract is in possession of said def't Central, and def't Central is now notified to bring the same into court as evidence on the trial hereof, or secondary evidence will be introduced of its contents.

E. A. McKENNEY AND
THOS. HARRISON,
For Pl'ff.

157 And further amending, withdraws and abandons all that portion of his amended petition setting up a mistake or omission in the contract herein sued on.

E. A. McKENNEY &
THOS. HARRISON,
For Pl'ff.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R. Co.; amended petition; filed Jan'y 12th, 1878; Chas. R. Beatty, cl'k D. C., McL. co., Texas, by E. W. Pew, dep'y.

158 *Amended Petition.*—Jan. 16, '78.

District court, McLennan county, November term, 1877.

T. M. Shirley
vs.
Waco Tap Railroad Company. } No. 1779.

And now comes pl'ff, and after leave amends his original and amended petitions, and in addition to his several prayers in the same, prays to be allowed interest from the day and date of the disruption of his contract, on the amount found to be due him as profits, or actual damages, at the rate of ten per cent. per annum, or such other rate as may seem proper in the premises, to be computed as a part of his judgment in this cause.

E. A. McKINNEY AND
THOS. HARRISON,
For Pl'ff.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R. co.; amended petition; filed Jan'y 16, 1878; Chas. R. Beatty, clerk D. C., McL. co., Texas, by E. P. Pew, dep'ty.

159 *Amended Petition.*—Jan. 16, '78.

District court, McLennan county, November term, 1877.

T. M. Shirley
vs.
Waco Tap R. R. Co. } No. 1779.

And now comes pl'ff, and after leave amends his petitions, and says, by way of replication, that he denies all and singular the allegations and charges in def't Central's ameneded answer, setting up acquiescence, affirmance, or consent to the acts and doings of def't Central about def't Tap, and herewith files his affidavit denying the same.

E. A. McKENNEY &
THOS. HARRISON.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap Railroad Company; amended petition; filed Jan'y 16th, 1878; Chas. R. Beatty, clerk D. C., McL. co., Tex., by E. P. Pew, dep'y.

160 *Leave to Amend.*—June 7, 1878.

May term, 1878, district court, McLennan county.

T. M. Shirley
vs.
Waco Tap R. Co. } No. 1779.

JUNE 7, 1878.

And now comes the plaintiff herein and asks leave of the court to amend his original and several supplemental and amended petitions and consolidate them into one petition.

E. A. McKENNEY &
THOS. HARRISON,
For Plaintiff.

(Endorsed, to wit:) No. 1779; T. M. Shirley *vs.* Waco Tap R. Co.; leave to amend; filed June 7th, 1878; Chas. R. Beatty, clerk D. C., McL. co., Texas.

161 *Amended Petition.*—Nov. 15, 1878.

November term, 1878, district court, McLennan county.

T. M. Shirley
vs.
Waco Tap R. R. Company. } No. 1779.

And now at this term, and on this the 15th day of November, comes the plaintiff, T. M. Shirley, by his attorneys, and by leave of court withdraws the following portion of his amended original supplemental and amended petition, filed June 7th, 1878, and no further relies on the same in this cause, to wit: "That after said act of merger, on or about the 24th day of June, 1874, the said H. & T. C. R. co. ordered a meeting of what was called the directors of the said W. & N. R. co., and after the persons calling themselves directors were assembled at Waco aforesaid, a majority of whom were directors of the said H. & T. C. R. co., they granted and conveyed to said H. & T. C. R. co. all the lands and land certificates to which the said W. & N. R. co. was entitled as a donation from the state of Texas, amounting in the aggregate to five hundred thousand acres of land, which the said H. & T. C. R. co.

162 afterwards located on the unappropriated domain of the state of Texas, in what is known as Hardeman, Childress, Cottle, Kent, Dallam, Tom Green, Howard, Mitchell, and other counties of the state of Texas, and well worth at that time one million of dollars, the consideration of which was pretended to be the two hundred thousand dollars claimed by the H. & T. C. R. company to be due it from the W. & N. R. company under said bond and deed in trust. Your petitioner avers and charges that all said acts of the pretended board of directors of said W. & N. R. company are illegal, fraudulent, and void, because they had no authority

to act; because said transfer was not authorized by the stockholders of said W. & N. R. company, called for that purpose; because said sale was in violation of the statute donating said lands to said W. & N. R. company; because if said pretended directors had any authority to act at all, it was but to close up the affairs of said W. & N. R. company, and distribute its remaining assets fairly among its creditors; because it was no sale, there being but one party to the transaction, to wit, the said H. & T. C. R. company; because of the gross inadequacy of the price pretended to be paid by said H. & T. C. R.
163 company; because it was in fraud of your petitioner's rights, and has injured and damaged him; because it was *ultra vires*, the said H. & T. C. R. company having no authority to acquire lands beyond its needs for use as a railroad, depot grounds, etc., from any source except the state."

"Five hundred thousand acres of land, situated as aforesaid, the donation of the state to said W. & N. R. company, of the value of one million dollars." And prays this withdrawal to be made of record.

(Endorsement:) T. M. Shirley *vs.* Waco Tap R. W. company. Filed Nov. 15th, 1878. Chas. R. Beatty, cl'k D. C., McL. co., Tex.

164 *Answer.*

In district court, McLennan county, fall term, 1870.—Nov. 25, 1870.

T. M. Shirley
vs.
Waco Tap R. R. Co. } No. 1779.

And now at this term comes the defendant in the above styled and numbered cause, and defending the wrong and injury, &c., &c., says the allegations and averments in said plaintiff's petition made and set out, are insufficient in law to entitle him to have and maintain his said action, and of this he prays judgment of the court.

FLINT, CHAMBERLAIN & GRAHAM,
COKE, HERRING & ANDERSON,
Att'ys for def't.

And for plea in this behalf, defendant denies all and singular the allegations and averments in said plaintiff's petition contained, and says the same and each of them are untrue in manner and form as therein made and set out, and of this puts himself upon the country.

And answering in this behalf defendant says the contract
165 set out and declared on in said plaintiff's petition is now and was from the beginning absolutely null and void, and such as no court of law or equity should countenance or enforce, in this: that the same was procured, and the defendant was induced to execute and enter into the same by the false, fraudulent, covinous,

and iniquitous representations and conduct of said plaintiff, Thos. M. Shirley, and the sureties on his said bond, Massey and Sessums. Defendants aver that said plaintiff, Shirley, represented himself able and competent with money and all necessary means of his own, and to be furnished by said Massey and Sessums when necessary to begin, carry on, and complete the work specified and defined in said contract according to its terms, and represented to this defendant that said Massey and Sessums were immensely wealthly and controlled and had many hundreds of thousand dollars, and would advance and furnish the same to said Shirley, or as much thereof as might be necessary to enable him fully and in all things to begin, carry out, and complete the work defined and set out in said contract according to its terms. It is further averred that said Shirley, the plaintiff,
166 did represent to this def't that in entering into said contract he, the said Shirley, was sustained, upheld, and backed with all the money, means, credit, and financial ability of said Massey and Sessums, and that said Massey and Sessums were able and more than able to furnish the money and means to build and equip the entire road from Bremond to Waco. Def't avers that as a component part of said contract said pl't'ff Shirley agreed to execute and deliver a good and sufficient and solvent bond to this def't in the sum of one hundred and fifty thousand dollars as a security to this def't for the proper performance of his (Shirley's) part of said contract, and it is averred that said Shirley did execute and deliver a bond in said amount with said Massey and Sessums as sureties, and that relying on the representations aforesaid this def't did accept and approve the same, and still relying on and confiding in the said representations of said Shirley that this def't did enter into a contract with said Shirley substantially like the one attached to pl't'ff's petition.

Def't avers that this def't was moved and induced solely by
167 confidence in and reliance on the representations aforesaid of said Shirley to enter into the said contract and to accept said bond, and that said Massey and Sessums made repeatedly to the president and other officers of the Waco Tap Railroad co. the same representations as those made by said Shirley, and as an inducement to said company to bring about the execution of said contract; that said Massey and Sessums reside and did then reside in the city of Galveston, Texas, a point remote from this, and apparently were doing a large cotton factorage and grocery business, and that this def't could not obtain at the time of the execution of said contract, nor for a considerable time afterwards, any information of the falsity of the representations of said Shirley aforesaid. But this def't avers and charges that at the time of making said contract and before and while treaty for the same was pending, and when the representations of said Shirley as aforesaid were made, the said Massey and the said Sessums and the said Shirley were hopelessly bankrupt and insolvent—unable even to pay a small per cent. of
168 their debts, all of which was well known to the said Shirley at the time and was well known to the said Sessums and Mas-

sey at the time; and in a short time thereafter, to wit, one hundred days after the execution of said contract, or thereabouts, the insolvency and utter inability of the said Massey and Sessums to pay but a very small per cent. on their just debts became public and notorious, and at the same time the fact became patent and public that said Massey and said Sessums were at and before the making of said contract and the representations aforesaid utterly bankrupt and insolvent. Wherefore def't says that the representations aforesaid, which alone induced this def't to enter into said contract, were willfully and fraudulently false; and def't further says that by reason of the utter insolvency and bankruptcy of all the obligors in the aforesaid bond, all of which was well known to said Shirley at the time of the execution of the same, and unknown to the president and directors of the Waco Tap Railroad company, and the fraud of said Shirley in inducing an acceptance and approval of the same,
169 the said bond is and has always been a nullity, and said contract has been and is incomplete by reason of the failure of said Shirley to give bond and security for its faithful performance on his part, as he was bound to do. Def't avers that the frauds aforesaid have operated and are now producing great injuries and damages to the interests of said railroad company; that large amounts of money and implements and large commercial credit on the part of said Shirley and his supporters and backers were necessary to enable him, the said Shirley, to comply on his part with said contract; that the insolvency and bankruptcy of said Shirley and his supporters, Massey and Sessums, their utter destitution of money, means or commercial character and credit, has rendered such efforts at compliance as have been made by Shirley abortive and unavailing, and has brought discredit and disgrace upon this def't. Def't avers that said Shirley has utterly failed in every respect to comply with said contract, and this def't here charges a distinct and unqualified breach of said contract by said Shirley, in each and
170 every part thereof, and an utter failure to do or perform any part or portion of the work specified & defined in said contract to be done. Def't avers that by reason of the aforesaid frauds of the said Shirley, the discredit & disgrace brought on the Waco Tap R. R. company in being identified with said insolvent & bankrupt parties, the delays in constructing said railroad by means of said null and abortive contract, and the expense incurred by this def't in preparing for work under said contract before its nullity became known, and by reason of twenty-five thousand dollars paid out to said Shirley by this def't, which it is averred was so paid for work fraudulently represented by said Shirley to have been done on said road under said contract, but which in fact was not so done, this def't has been damaged in the sum of fifty thousand dollars, which is here plead in reconvention, and for which, being ready to verify all the allegations herein, he prays for judgment against said Shirley. Defendant further prays that said contract be held and adjudged null & void, and that *the* declared cancelled and of no effect.

171 And answering further in this behalf, if it shall be held that said contract has force and validity, this def't says that said pl'tff should not have and maintain his action aforesaid; because he says that this def't did in all things comply with the letter and spirit of said contract, and was still proceeding in full and strict compliance with the same in all its requirements when, in the month of March, 1870, said plaintiff, Thos. M. Shirley, left the work on the line of the road in Falls co., Texas, failed and refused to pay his laborers and employees thereon, and failed & refused to furnish them subsistence, and failed and refused to carry on the work under said contract; and he, the said Shirley, being in a hopelessly insolvent condition, all his property of every kind & description used in attempting to carry on the work on said road under said contract was seized and attached by officers of the law in virtue of legal process issued at the suit of his creditors, was left without
172 tools or implements or other equipments with which to carry on said work; and he, the said Shirley, still remaining absent, it is averred could not be found by the officers or any of them of the Waco Tap Railroad company, and refusing to communicate with them or either of them when he was sought for by them. And it is further averred that said Shirley, having repeatedly failed and refused to pay his laborers & employees on said work in said month of March, 1870, still refusing, all his said laborers and employees abandoned the work, and so having no laborers, no implements or equipments on said road, having no work going on, and being then and having continuously for many months previous thereto been absent and inaccessible, with a full knowledge, as is averred to be the fact, that the work was abandoned, it is averred and charged that said Shirley at the time aforesaid did wilfully abandon his said contract, and release this def't from further obligation to observe the same.

Def't avers that the Waco Tap Railroad company was and is a corporation dependent for its success in building said railroad on the confidence of the public *of the public* in its ability to meet
173 all just demands against it promptly and punctually, and that said company has fully paid to said plaintiff, Shirley, every dollar due him for work done under said contract, and always, from the commencement of said work to the time of its abandonment by said Shirley, did pay him every dollar due him promptly & punctually, and for the most part paid him in advance before the same was due. Yet def't avers that said Shirley, with a two-fold object—first, with the malicious intent to injure, defraud, and disgrace the credit of said company, and, secondly, with the object of screening himself from the just indignation of his numerous unpaid creditors, who were pressing their demands upon him—did maliciously, slanderously, falsely, and fraudulently represent, publicly and privately, to his laborers and employees, and to his various clamoring creditors, to the great injury and damage of said company's credit and standing, that said company had failed and refused

and were not able to pay him (said Shirley) the money due
174 for work done on said road under said contract. All this in the months of Jan'y, February, and March, in the year 1870, and in direct violation of the letter and spirit of said contract. All of which def't is ready to verify.

And for further answer def't says that if the contract set up and declared on ever had any validity, which is not admitted but denied, that the same was wholly abandoned and set at naught, and the defendant released from further observance of the same by said Shirley in the month of March, 1870, by the failure and inability of said Shirley to work under or perform the same or any part thereof, and by the total want and destitution on the part of said Shirley of any labor or tools or implements or equipments or of money or credit to procure the same or either of them for carrying on work under said contract. And def't avers that at said date the said plt'ff Shirley, and the sureties on his said bond, Sessums and Massey, were wholly and notoriously bankrupt and insolvent and utterly unable to respond in damages for the breach of said contract, and that if def't had waited longer before taking possession of said road and declaring said contract abandoned and forfeited, the damage to said company, its credit, standing and prospects, would have
175 been great and irreparable, and without any redress except upon said insolvent and utterly worthless bond, all of which def't is ready to verify.

And answering further, def't says by reason of the facts set out and alleged in the two pleas just preceding this, which are here referred to as a part of this plea, the said Shirley has in letter and spirit broken and violated the said contract, and in so doing has injured and damaged the credit and standing of said company, has retarded and delayed the building of said railroad, has caused said company to incur great expense with a view of carrying out said contract which was otherwise unnecessary, has hampered and embarrassed said company in its financial operations necessary to be consummated in order to the building of said road by his absurd claim for damages preferred in this suit, all to the damage of def't twenty-five thousand dollars, which is here pleaded in reconvention, and for which judgment is prayed against said Shirley.

FLINT, CHAMBERLAIN & GRAHAM,
176 COKE, HERRING & ANDERSON,
For Def't.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R. company; answer; filed November 25th, A. D. 1870. D. F. Davis, cl'k dist. court, McL'n co., Tex. F. C. & G.; C. H. & A.

Amended Answer.—April 23, '74.

THE STATE OF TEXAS, }
McLennan county. }

In district court.

Thomas M. Shirley
vs.
The Waco Tap R. R. Co. } No. 1779.

And now comes defendant, leave of the court being first had and obtained, and amends and alleges for further defence that an-
177 terior to the contract stated in plaintiff's petition that plaintiff had filed in the district court of the United States for the eastern district of Texas his petition and schedules for a discharge in bankruptcy from all his liabilities and debts, which petition and schedules, sworn to by plaintiff, were filed in said court at Galveston on the 1st day of June, A. D. 1868. And at the time of entering into said contract the fact of defendant's bankruptcy and his said application was wholly unknown to any of the parties who were officers of said road, or who was engaged in making, and did make, said contract with plaintiff; and said plaintiff studiously and designedly concealed from them said fact, and represented himself as wholly solvent and able to carry on said work.

And further amending, defendant alleges that on the 29th day of March, 1870, from the fact that said plaintiff, Shirley, had abandoned his attention to said work on said railroad, and failed to pay his sub-contractors and laborers on the same, one John
178 Byrne sued out an attachment from the district court of Falls county, state of Texas, and had all the tools, implements, and everything used on said work, belonging to said Shirley, attached, and thereby suspended and delayed the work thereon. Said Byrnes was a sub-contractor on said work, in the employ of said Shirley, and brought said suit for money due him for said work.

By reason of all these and other wrongs of said Shirley, he forfeited all rights under and by virtue of said contract.

HERRING & ANDERSON,
Att'ys for Def't.

(Endorsement:) No. 1779. Thos. M. Shirley *vs.* Waco Tap R. R. Co. Amended answers. Filed April 23, 1874. D. R. Gurley, cl'k D. C., McL. co., Tex., by Chas. R. Beatty, d'y. Amended answer.

Amended Answer.—April 24, '74.

T. M. Shirley
vs.
Waco Tap R. R. Co. } No. 1779.

And now comes defendant, leave of court being first had
179 and obtained, and amends his second answer heretofore filed, and alleges that on or about the 1st day of February, 1870,

plaintiff entirely abandoned said work on said road and ceased to give any personal supervision of said work on said railroad, and absented himself from the entire line of said road, and during the said month of February and March left said work under the supervision of no one but some drunken and irresponsible sub-contractors; and to avoid any notice to which he might have been entitled, purposely during all said time concealed himself and purposely failed to answer repeated letters and telegrams sent to him during said time by the president of said company and the engineer of said company in regard to the work thereon, which telegrams were sent to him at his place of residence by due course of telegraph, and said letters were mailed, postage prepaid, and directed to him at said place, but which he says he never received, and said engineer during said time hunted him up and expostulated with him in regard to his inattention to the work on said road, and plaintiff would not even
180 promise or propose to change his course with reference to the work on the same. Defendant further says that by the spirit and legal import of said contract said plaintiff was bound to execute and perform a reasonable amount of said work monthly on said road, approximating to about $\frac{1}{24}$ of the entire work; and defendant avers that in violation of said contract, although about eight months had elapsed from the date of said contract until the same was declared at an end, defendant had not completed then such amount of said work.

Plaintiff well knew that in order to keep up the credit of said road it was absolutely necessary to do said amount of work for each month in order to inspire confidence in those who had subscribed means to build said road so as to induce them to pay their instalments on their subscriptions; and this plaintiff well knew was the only source from which defendant could realize means to pay for work on said road. Plaintiff, by his neglect and failure to comply with his said contract, by the terms of said contract, forfeited all pay for
181 any work done thereon.

HERRING & ANDERSON,
Attorneys for Def't.

(Endorsement:) No. 1779; T. M. Shirley *vs.* W. T. R. R. Co.; amended answers, filed April 24th, 1874; D. R. Gurley, clerk.

182 *Verdict.* — February 2, 1875.

T. M. Shirley
vs.
W. T. R. R. Co.

We, the jury, find for the plaintiff of reserved percentage, with interest to date, $2,565.15, American coin.

2d. For work, with interest to date, $3,503.80, American coin.

3d. For actual damages, in American coin, $100,612.

4th. For exemplary damages, in American coin, $1,000.

5th. We, the jury, find for the plaintiff in the question of mistake in contract.

6th. And we find the plaintiff entitled to a valid prior lien on the franchises, road-bed and property of the company.

February 2d, 1875.

FRED. QUARLES,
Foreman.

(Endorsement:) 1779; T. M. Shirley *vs.* Waco Tap Railroad Co.; verdict of the jury, filed February 2d, 1875; D. R. Gurley, clerk D. C., McL. county, by Chas. R. Beatty, deputy.

183 *Petition for Writ of Error.*—March 31, '75.

The state of Texas, McLennan county, in district court.

Thomas M. Shirley
vs.
Waco Tap Railroad Co. } No. 1779.

The petition of defendant in the above entitled cause alleges that on the fourth day of February, A. D. 1875, plaintiff, Thomas M. Shirley, who resides in the county of Harris, state of Texas, recovered a judgment against defendant in the district court of McLennan county, state of Texas, by the name and style of the Waco & Northwestern Railroad company, for the sum of one hundred and six thousand six hundred dollars & 95-100 in American coin, and the further sum of one thousand dollars in the currency of the country, as is fully shown by a copy of said judgment herewith filed and made a part of this petition, marked Exhibit "C," and decreeing a sale of the said railroad, road-bed, &c., as therein fully set forth.

Petitioner alleges that said judgment is erroneous, and prays
184 for a writ of error to remove said cause from the district court of the state of Texas.

HERRING & ANDERSON,
Att'ys for Defendant.

Exhibit "C."—Febru. 4th, A. D. 1875.

T. M. Shirley
vs.
Waco Tap R. R. Co. }

This cause, which had been called for trial upon the 26th day of January, 1875, and having continued on trial through several days of the court until return of the verdict of the jury into court on the 2d day of February, 1875, at the calling thereof came the parties, both plaintiff and defendant, and by attorneys announced as ready for trial; when came a jury of twelve good and lawful men, to wit, Fred Quarles and eleven others, who were duly elected, empanelled, and sworn to try the issue herein joined between the parties.

After the impanelling of said jury and during progress of trial, to wit, on the 29th day of January, one of the said jurors becom-
185 ing unwell and unable further to sit in the cause, was excused by the court and the parties continued by consent upon the trial of the cause with eleven jurors. First come on to be heard the exceptions of defendant to plaintiff's amended petition, and after hearing the arguments of counsel thereon, and due consideration by the court, the same is sustained as to want of affidavit of indebtedness to Byrnes, but is overruled as to the averments therein contained as to the acts of defendant in procuring the issuance of writ of attachment; also sustained by the court as to the averments in relation to transfer of road-bed, franchises, & etc. And the parties here proceeded in the trial of the cause, and after hearing the evidence introduced by the parties, the arguments of counsel, and being charged by the court as to the law, as per certain written instructions to them read and submitted, the jury retired to consider of their verdict, and after some length of time, to wit, on the 2nd day of February, A. D. 1875, returned into open court the following verdict, to wit:

186 We, the jury, find for the plaintiff of reserved percentage, with interest to date, $2,565.15 American coin; 2nd, for work done, with interest to date, $3,503.80 American coin; 3d, for actual damages, in American coin, $100,612.00; 4th, for exemplary damages, in American coin, $1,000.00; 5th, we, the jury, find for the plaintiff the question of mistake in the contract; 6th, and we find the plaintiff entitled to a valid prior lien on the franchises, road-bed, and property of the co.

FRED QUARLES,
February 2nd, 1875. *Foreman.*

Wherefore it is considered by the court from said response & verdict of the jury that they had found for the plaintiff in all the issues submitted to them in the charges given them, it further appearing to the court that the defendant sued on by its name of Waco Tap Railroad and incorporated by act of legislature, November 5th, 1866, had, after the institution of this suit, to wit, on the 5th day of August, 1870, by an act of the legislature of the state of Texas, approved on said last mentioned day, changed its name to the Waco and Northwestern Rail-
187 road company, and otherwise changed and enlarged its charter, rights and privileges and franchises, and further appearing to the court that plaintiff's petition averred such contemplated changes and contained a prayer for relief to that end, it is ordered, adjudged and decreed that the plaintiff in this cause, Thomas M. Shirley, do have and recover of and from the said defendant as the Waco Northwestern Railroad company, his judgment for the full sum of one hundred and six thousand six hundred and eighty-two dollars and 95-100 in American coin, and in the further sum of one thousand dollars in the currency of the country, and except the one

hundred thousand and six hundred and twelve ($100,612.80-100) actual damages and one thousand dollars being for exemplary damages to bear ten per cent. interest from this date, and said amount of $100,612 and $1,000 to bear 8 per cent. from rendition; and whereas the plaintiff sets up in his amended petition that the contract between himself and the def't does not fully express the understanding and agreement between the contracting parties at
188 the time the contract was made, that it was then understood and agreed and embodied in a protocol or memorandum containing the stipulations and agreements between the parties that the plaintiff should have a prior valid lien on the franchises, road, road-bed, land and other property of the defendant as set forth in their charter, to secure to him such damages as he might sustain by a breach of the contract by the def't, as well as for same due him for reserved percentage for work done, and in other sum that might be then due the plaintiff. That the memorandum containing this, with the other points of agreement between the parties, was delivered to the attorney of the defendant to prepare the contract, and that by mistake or accident the provision was omitted and that the contract was signed in ignorance of this omission, and with the understanding and in full confidence that it contained all the stipulations and provisions (including this) embraced in the memorandum; and whereas that issue having been submitted to the jury, and the jury having found for the plaintiff on that issue of mistake in the contract, it is now here ordered and decreed by the court that the contract between pl'ff and def't be reformed to conform
189 to the intention and meaning of *of* the parties at the time of the making of said contract and to accord with the terms of said memorandum & in accordance with the finding of the jury; and it is therefore ordered, adjudged, & decreed by the court that the plaintiff's said judgment be and the same is held to be a prior valid lien on all of defendant's said road-bed, rights, franchises, lands, & privileges as granted in its charters as aforesaid, as in accordance with the further finding of the jury not to include the one thousand dollars heretofore mentioned; and it is further ordered, adjudged, and decreed that the sheriff of McLennan county shall enter upon & take possession of the road, road-bed, and franchises of the defendant, the Waco Northwestern Railroad company, in the county of McLennan and Falls and such other counties of the state of Texas any way shall be found, and shall advertise & sell road, road-bed, franchises as shown by defendant's said charter & said contract, according to the law of Texas governing such sales, and ex-
190 ecute due deed of conveyance accordingly, making due return to this court of his acts herein, and the proceeds of such sale to pay over to the plaintiff in discharge of the judgment, and if any remain in his hands after fully liquidating this judgment, interest, and costs, the same to pay to the defendant; but if the proceeds of such sale are not sufficient to pay said judgment, & then the plaintiff have his execution for said remainder.

(Endorsement:) No. 1779; Thomas M. Shirley vs. Waco Tap R. R. company; petition for writ of error; filed March 31st, 1878; D. R. Gurley, clerk D. C., McL. co.

191 *Bond for Writ Error.*—March 31, '75.

THE STATE OF TEXAS, }
McLennan county. }

In district court.

Thomas M. Shirley }
vs. }
Waco Tap Railroad Co. }

Know all men by these presents, that whereas on the (4) fourth day of February, A. D. 1875, there was rendered a judgment and decree in the district court of McLennan county, state of Texas, in the above-entitled cause, in favor of Thomas M. Shirley, plaintiff, against defendant as the Waco & Northwestern Railroad company, which judgment and decree is fully shown by a substantial copy of the same herewith filed, marked Exhibit "A," and made a part of this bond, and whereas said defendant has filed his petition for a writ of error to remove said cause from the said district court to the supreme court of the state of Texas, wherefore we, the defendant aforesaid, as principal, and W. R. Baker and *and* A. Groesbeck, as securities, acknowledge ourselves to owe and be indebted to said Thomas M. Shirley, plaintiff, in the sum two thousand dollars,
192 for the payment of which we bind ourselves, our heirs, executors, and administrators, jointly & severally; the above obligation to be void, nevertheless, should said defendant pay or cause to be paid all costs that may accrue in said supreme court, or may have accrued in the district court aforesaid, in said cause.

Witness our hands and scrawls for seals this 31st day of March, A. D. 1875.

THE WACO & NORTHWESTERN
RAILROAD COMPANY, [SEAL.]
By JOHN T. FLINT, *Pres.*
W. R. BAKER, [SEAL.]
A. GROESBECK. [SEAL.]

Approved March 31st, 1875.

D. R. GURLEY,
Cl'k D. C., McL. Co.

THE STATE OF TEXAS, }
County of Harris. }

I, R. D. Westcott, cl'k of the district court in and for said county and state, do hereby certify the W. R. Baker and A. Groesbeck, whose names are signed to the above bond, or solvent and worth

over above the amount specified in said bond, and would be taken by me for said amount if said suit was pending in this county.

Witness my hand and seal of said court, at office in city of
193 Houston, this 22d day of M'ch, 1875.

[SEAL.] R. D. WESCOTT.

Exhibit "A."

Made part of bond for writ of error.

(This exhibit is a copy of the judgment and decree of the district court, which appears in full annexed as Exhibit "C" to the petition for writ of error.)

(Endorsement:) No. 1779; Thomas M. Shirley *v.* Waco Tap R. R. Co.; bond for writ of error; filed March 31, 1875. D. R. Gurley, cl'k D. C., McL. co.

194 *Answer H. T. C. R'way Co.*—May 4, 1876.

In the district court of McLennan county.

Thomas M. Shirley
vs.
The Waco Tap Railroad Co., afterwards Waco Northwestern Railroad Company, and the Houston and Texas Central Railway Company. } No. 1779.

And now comes the Houston & Texas Central Railway company, by its attorneys, and demurs to the plaintiff's petition, and says that the same and the matters and things therein contained and set forth in manner and form therein stated are wholly insufficient in law, and this defendant prays the judgment of the court thereon, &c.

GEO. GOLDTHWAITE,
Atty. for def't, the H. & T. C. R. W. Co.

And not waiving, but still insisting upon its above and foregoing demurrer, if required to make further answer, this defendant denies each and every allegation in said petition contained, and says that the same are not true as therein stated, and puts itself upon
195 the country, &c.

GEO. GOLDTHWAITE,
Atty. for Houston & Texas Central Railway Company.

(Endorsed, to wit:) No. 1779; Thomas M. Shirley *v.* The Waco Tap Railroad company et al.; answer of H. and Texas C. R. W. Co., filed May 4th, A. D. 1876; Chas. R. Beatty, cl'k D. C., McL. co., Texas.

196 *Answer H. T. C. R. W. Co.*—Dec. 29, 1877.

In the district court of McLennan county.

Thomas M. Shirley
vs.
The Waco Tap Railroad Company et al. } No. 1779.

And now comes the Houston and Texas Central Railway company, one of the defendants herein, by its attorneys, and by leave of the court first had and obtained amends its answer herein, and for amendment says:

1st. That said plaintiff his action aforesaid against this defendant did not commence and sue within two years after the cause of such action or suit, and this the said defendant is ready to verify, whereupon this defendant says that said action is barred by the statute of limitation in such cases made and provided.

2d. That said plaintiff his action aforesaid against this defendant did not commence and sue within four years after the cause of such action or suit, and this the said defendant is ready to verify, wherefore this defendant says that said plaintiff is barred of his action aforesaid by the statute of limitation in such cases made and provided.

197 3d. That the said Waco and Northwestern Railroad company on the 10th day of June, A. D. 1871, needed aid in the construction and completion of its railroad from the said town of Bremond to the city of Waco, and without such aid was wholly unable to complete and equip its line of road in accordance with the term of its charter, and in its extremity and necessity applied to this defendant, the Houston and Texas Central Railway company, for the material aid necessary to the building and construction and equipment of its said road; that negotiations were entered into between said railroad company and this defendant, which resulted in a contract and agreement between the Waco and Northwestern Railroad company, and the Houston and Texas Central Railway company, being entered into on the said 10th day of June, A. D. 1871, in and by which contract and agreement the said Waco & Northwestern Railroad company undertook, agreed and covenanted with the Houston and Texas Central Railway company to do and perform on its part all and singular the undertakings, agreements, and covenants set forth and expressed

198 in the written contract or articles of agreement, a copy of which is herewith annexed and made a part hereof, marked Exhibit "A," and the said Houston and Texas Central Railway company undertook and agreed and covenanted with the said Waco and Northwestern Railroad company to do and perform on its part all and singular the undertakings, agreements, and covenants set forth and expressed in said instrument of writing, "Exhibit A," which undertakings, covenants, and agreements are the parts of said parties thereto, and here pleaded in their very terms and ac-

cording to their tenor and effect respectively and without further notice thereof.

4th. That afterwards, to wit, on the 31st day of October, A. D. 1871, the said parties to said original contract, "Exhibit A," made and entered into another and further contract and agreement, a copy of which is hereunto annexed and made part hereof and marked "Exhibit B." By the terms, agreements, stipulations, and covenants therein contained the said original "Exhibit A" was modified
199 and changed in the several particulars as therein set forth, and from that date the said instruments of writing, "Exhibit A" and "Exhibit B," to be taken and construed together, express the several stipulations, agreements, and covenants by which the parties thereto respectively bound themselves each to the other, and the same are here pleaded in the very terms and according to the legal tenor and effect thereof without further recitals therefrom.

5th. That in and by the 5th article of the said original contract, "Exhibit A," the said Waco and Northwestern Railroad company agreed to convey, and did thereby convey and transfer to this defendant, the Houston and Texas Central Railway company, upon condition that said last-mentioned company should do and perform all and singular what it had undertaken to do and perform in said contract, "Exhibit A," and upon such performance the conveyance to become absolute and complete, the following described property, to wit:

1st. All of the interest and claim of the said Waco and Northwestern Railroad company in and to one hundred and fifty
200 acres of land conveyed by Taylor to John T. Flint in trust, being the point selected for a depot next above Bremond, in Falls county.

2d. The interest and claims of the said Waco & Northwestern Railroad company in and to 62 acres of land at Martin, conveyed and held by John T. Flint in trust for the said railroad company & others; and, 3d, that tract of 20 acres of land in one body within the corporate limits of Waco, on the east side of the Brazos river, for depot purposes, being the tract adjoining the suspension bridge property, which is held and contracted for by title from J. D. Giddings and others. That this defendant did and performed all & singular what it had undertaken to do and perform, according to said agreement "Exhibit A," and upon such performance the title to said property above mentioned became absolute and complete, and the said property became and was part of the consideration moving from the said Waco and Northwestern to the Houston and Texas Central Railway company for the construction of said line of railway from Bremond to Waco aforesaid, and not as a security
201 or otherwise than as part of the consideration as aforesaid.

6th. That the said Waco and Northwestern Railroad company, the party of the first part to said instrument of writing "Exhibit A," in and by the "sixth" article thereof, in consideration of the agreements and undertakings and covenants on the part of the

Houston & Texas Central Railway company, to be by it done, executed, and performed, agreed to execute its bond to said Houston and Texas Central Railway company for the sum of six hundred thousand dollars, gold, ($600,000.00,) payable on or before the first day of January, A. D. 1873, and to secure the same by a deed of trust by which was to be conveyed the franchise or charter rights of the said Waco & Northwestern Railroad company, road-bed, right of way, and other privileges & appurtenances of its railroad to Peter W. Gray and Benjamin A. Botts, as trustees, empowering them, or either of them, to sell and convey said property in satisfaction of said bond in the event of failure on the part of said Waco and Northwestern Railroad company to comply with their agreements, to wit:

202 If the said railroad company, party of the 1st part, should fail to grade the road and furnish the cross-ties from Martin to Waco by the first of June, A. D. 1872, then the said bond should be considered due and payable, and the trustees should sell according to said deed; or,

2d. If said Waco and Northwestern Railroad company should fail to pay the said six hundred thousand dollars, ($600,000,) by the first day of January, A. D. 1873, then the trustees should sell according to said deed, all of which will more fully and particularly appear by reference to the said contract or instrument of writing, "Exhibit A," hereunto annexed.

7th. That afterwards, to wit, on the 6th day of July, A. D. 1871, and in compliance with and in the execution of said contract, "Exhibit A," the said Waco and Northwestern Railroad company made, executed and delivered to this defendant, the Houston and Texas Central Railway company, its certain bond for the sum of six hundred thousand dollars in gold, a copy of which bond is made, executed and delivered, is hereunto annexed and made part of this answer, and marked "Exhibit C," and this defendant here pleads the same according to its very terms and tenor and effect,

203 without further writing the same.

8th. That on the day and date last above mentioned, to wit, on the 6th day of July, A. D. 1871, and in compliance with and in the execution of said contract, "Exhibit A," the said Waco and Northwestern Railroad company made, executed and delivered to this defendant, the Houston and Texas Central Railway, its certain deed in trust, conveying to said P. W. Gray and Benjamin A. Botts, as trustees, for the use of this defendant, all and singular the several tracts and parcels of land which might then or thereafter constitute the site of the roadway, turnouts, side tracks, depot grounds and appurtenances, and all lands which then were or which might thereafter constitute and be a part of the road, and the right of way thereof of the said Waco and Northwestern Railroad company from the town of Bremond, where it is connected with the road of the Houston and Texas Central Railway, to the depot grounds in the city of Waco, on the east side of the Brazos

river, and therein as authorized by the charter of said Waco and Northwestern Railroad company, and also the cross-ties and other superstructure which had then or might thereafter
204 be constructed, placed, or built on the line of road aforesaid, and also all and singular the chartered rights, privileges, and franchises of every kind granted to the said Waco and Northwestern Railroad Company by acts of the legislature of the state of Texas, of which it was then or might thereafter be possessed or become entitled to under said acts and the laws of Texas relating to railroads, of which deed in trust a copy is hereunto annexed and made part hereof, marked "Exhibit D," and this defendant here pleads the same and the several provisions thereof in their very terms and effect thereof without further reciting the same.

9th. That this def't immediately proceeded in compliance with and in the execution of the agreements and undertakings on its part agreed and undertook to be done and performed, and in all things did and performed all that was required of it, and completed the said road from the connection thereof in the town of Bremond to the depot grounds at the designated point on the east side of the Brazos river, in the city of Waco aforesaid, and within the time limited and prescribed for the completion of the same.

205 10th. That the Waco and Northwestern Railroad company was wholly unable to comply on its part with the terms and conditions of said contract, "Exhibit A" and "Exhibit B," and when the said bond "Exhibit C" matured and became due and payable, said railroad company made default in the payment thereof, and wholly failed, neglected, and refused to pay the same or any part thereof, and thereupon, at the request of this defendant, the said Peter W. Grey and Benjamin A. Botts proceeded to foreclose the said deed in trust, "Exhibit D," and in so doing in all things complied with the terms and conditions in said deed set forth and contained, and at the sale made in pursuance of said deed in trust by the said Grey and Botts, trustees, to wit, on the 4th day of February, A. D. 1873, this defendant purchased all and singular the property mentioned in said deed in trust, "Exhibit D," as conveyed to said trustees therein named, for the sum of four hundred thousand dollars, which sum, less the sum of five hundred and twenty-four dollars commissions to the said trustees and cost of advertising the sale, was credited upon said bond; and thereupon the said trustees made,
206 executed, and delivered their certain deed of conveyance whereby they conveyed to this defendant all and singular the property, rights, privileges, and franchises in said deed in trust mentioned and conveyed; and this defendant herewith files the original deed from the said trustees to this defendant and marks the same "Exhibit E," and prays that the same may be considered as here inserted, and read and considered as a part of this answer. That this defendant thereupon, to wit, on the 4th day of February, A. D. 1873, and when it purchased the said property at the said trustee sale, as aforesaid, entered into and upon said property and

took possession thereof, and has had and held the same as its own property, and continues to have and to hold the same in the full and absolute enjoyment thereof.

11th. That the said Waco and Northwestern Railroad Company was wholly unable to carry out the said original contract, "Exhibit A," on its part, and the said contracting parties found it convenient and advisable for the better and more certain fulfillment of said contract that the terms thereof should be modified and changed
207 and other and further and additional stipulations made to effect the objects of said agreements as originally entered into; and thereupon the said original contract was modified so that the time for the buying of the iron rails and completing the railroad from Bremond to Marlin was extended from January 1st, 1872, to March 1st, 1872. And in further consideration of changes, modifications, and alterations made in said original contract, "Exhibit A," by the supplementary agreement "Exhibit B," and especially in consideration of this defendant's releasing the said Waco and Northwestern Railroad company from clearing, grubbing, grading, and furnishing ties for said railroad from Bremond to Waco as remained unfinished at the date of said supplementary contract, "Exhibit B," to wit, on the 31st day of October, A. D. 1871, and the assuming by this defendant the work of completing the grading yet remaining to be done on said road and providing and furnishing the cross-ties remaining to be supplied, the said Waco and Northwestern Railroad company undertook and promised and agreed to transfer and deliver to this defendant one hundred thousand dollars
208 of the coupon bonds of the city of Waco to be issued to the party of the first part, the said Waco and Northwestern Railroad company, by the said city of Waco, under an ordinance of said city of the 7th of October, A. D. 1871, which transfer and delivery was to be made at the several times as thereinafter expressed, and which transfer and delivery was afterwards made to this defendant as stipulated and promised as aforesaid, and at the same time and in further consideration of the premises aforesaid the said Waco and Northwestern Railroad Company promised and agreed that upon the completion of its said railroad according to contract to the town of Marlin, it would issue and deliver to this defendant certificates of full paid stock in its company for one thousand shares of fifty dollars each, amounting to fifty thousand dollars, and upon the completion of said railroad to the depot grounds in the city of Waco, it would issue to the defendant certificates to like number, denomination and amount, in addition to the shares first above men-
209 tioned, amounting in all to shares to the amount of one hundred thousand dollars, which shares were in compliance with said promise and agreement afterwards issued to this defendant.

12th. That this defendant, under and in compliance with and in the execution of said contracts on its part as set forth in said writings "Exhibit A" and "Exhibit B," did build and construct said railroad from its connection with the line of the defendant's railway at Bre-

mond to the city of Waco, and in consideration therefor and not otherwise was received of and from the said Waco and Northwestern Railroad company at and before February 4th, A. D. 1873—

1st. The interest of the said Waco and Northwestern Railroad company in and to 150 acres of conveyed by Taylor to John T. Flint in trust, being the point selected for a depot next above Bremond.

2d. The interest of said Waco and Northwestern Railroad company in and to 62 acres of land at Marlin, conveyed to John T. Flint in trust for said railroad company and others.

210 3d. That tract of twenty acres of land in one body within the corporate limits of the city of Waco on the east side of Brazos river for depot purposes.

4th. One hundred thousand dollars of the coupon bonds of the city of Waco.

5th. One hundred thousand dollars of the stock of said Waco and Northwestern Railroad company.

6th. The bond of the said Waco and Northwestern Railroad company for the sum of six hundred thousand dollars, to pay which the said road and other property conveyed by said deed of trust was sold as hereinbefore set forth.

13th. That the said Waco and Northwestern Railroad company was merged in the Houston and Texas Central Railway company by an act of the legislature of the state of Texas, entitled "An act to provide for the merger of the Waco and Northwestern Railroad company, with its properties, rights, privileges, and franchises, in the Houston and Texas Central Railway company," approved May 24, 1873; that at the time of the passage and approval of said act, the said Waco and Northwestern Railroad company had conveyed all and singular the property, rights, privileges, and franchises

211 hereinabove enumerated and set forth as having been by this defendant in consideration for the execution of said contract for the building of said road and the building thereof by this defendant under said contract, and at and after said act of merger, no property, rights, privileges, or franchises of the said Waco and Northwestern Railroad company ever came to or was merged with or into this defendant.

14th. That all of said parties to said deed of trust "Exhibit D," the grantor therein, the said Waco and Northwestern Railroad co. and the Houston and Texas Central Railway co., both before or at the time of and after the execution of said said deed of trust, intended that the then inchoate rights to the lands which the said railroad company would become entitled to receive as a donation from the said state of Texas, viz., the land grant of sixteen sections of land per mile for each mile of constructed road, should be included in said deed of trust, and conveyed thereby as a part of the security for the payment of said bond for $600,000, "Exhibit C;" and this defendant charges that the same was not only intended so to be conveyed, but was actually conveyed by the terms

of said deed of trust to the said trustees, and by
212 said trustees to this defendant after the sale and foreclosure aforesaid, the same being included within and as a part of all and singular the chartered rights, privileges, and franchises of every kind granted to the Waco and Northwestern Railroad company by acts of the legislature of the state of Texas which are now possessed by it, or to which it may hereafter become entitled under said acts and laws of *laws of* Texas relating to railroads. But in order that no question or doubt might be raised in the future as to the right and title of the defendant to the said land grant under the said deed of trust and the conveyance of the same by the deed made by the trustees, the said sale so made by the trustees to this defendant was afterwards ratified, confirmed, and approved by the board of directors of the said Waco and Northwestern Railroad company, and by a resolution of said board the president of said company was authorized and instructed to make a special transfer and conveyance of said land grant, and in pursuance of such authority the president of said Waco and Northwestern Railroad company, for
213 and in the name of said company, executed and delivered such special transfer and conveyance to this defendant, and a certified copy of the original thereof will be exhibited on the trial hereof.

15th. That the said Thomas M. Shirley, the plaintiff in this suit, was on the 1st day of January, A. D. 1870, and for several years next ensuing, to wit, for five years and more, a stockholder and the owner of a number of shares of the capital stock of the defendant, the Houston and Texas Central Railway company; that during the years from and including the several years, A. D. 1870 to the year A. D. 1875, well and thoroughly informed and advised of all and singular the actings and doings of this defendant in and about the making of said contract with the Waco and Northwestern Railroad company of the 10th June, A. D. 1871, "Exhibit A," and of the making of said supplemental contract of October 31st, 1871, "Exhibit B," and of the execution and delivery of said bond for $600,000, "Exhibit C," and of the execution of the deed of trust to secure the same, and the delivery thereof by the said Waco and Northwestern Railroad company to this defendant, and the acceptance of the same by this defendant, and of the building and construction
214 of said railroad from Bremond to Waco by this defendant, and of the large outlay of capital and money by this defendant in the execution of said contract for the construction of said railroad; yet the said Shirley made no objection thereto as a stockholder in the Houston and Texas Central Railway company or otherwise, but stood by and permitted this defendant to enter into said contract for the construction of said railroad from Bremond to Waco, and lay out and expend its money and capital in the execution of said contracts without objection, but assenting thereto and acquiescing in all that this defendant was doing in and about the construction of said railroad; and the said Thomas M. Shirley, the

plaintiff herein, ought not now to be permitted or be heard to assert that this defendant was without authority to make said contracts for the construction of said road, or that its actings and doings in the premises were *ultra vires*.

16th. That the said plaintiff, Thomas M. Shirley, being a stockholder in the Houston and Texas Central Railway company on the 6th day of May, A. D. 1872, was at the annual charter meeting of the stockholders of this defendant, the Houston and Texas Central Railway company, elected a director and a member of the
215 board of directors of this defendant, and thereupon accepted and entered upon the discharge of his duties as such officer, and was thereupon appointed upon the executive committee of said board of directors, upon which committee devolved the principal administration of the affairs of said corporation; that he held and discharged the duties of director and member of the executive committee from the first Monday in May, 1872, to the first Monday in May, 1873, whereupon said last mentioned day he was re-elected a director for the ensuing year, and soon after was again appointed a member of the executive committee, which offices he accepted and held until the first Monday in May, 1874; that a large part of the work of constructing said railroad under said contracts, "Exhibits A" and "Exhibits B," was carried on and completed under the administration of the board of directors of the Houston and Texas Central Railway company, and of the executive committee thereof, of which board and committee said plaintiff was a member as aforesaid; that he not only made no objection, opposition or protest to the actings and doings of this defendant in the carrying out said contracts for the construction of said railroad
216 thereunder, but aided and assisted by his counsel and advice in the execution of said contracts and the building of said road; that soon after the purchase of the said Waco and Northwestern Railroad and other property mentioned in said deed of trust by this defendant, to wit, on the 11th day of February, 1873, the said Wm. J. Hutchings, vice president, made a report of said purchase to the board of directors then convened, and thereupon it was unanimously resolved, "That the action of Mr. Hutchings in making said purchase be approved and that the proper officers of this company be authorized to take such steps as may be necessary to perfect said purchase." That at said meeting the said Thomas M. Shirley was present as a member of said board and acquiesced and assented to said resolution; that afterwards, to wit, on the 11th day of June, A. D. 1873, at a meeting of the board of directors of this defendant company, of which meeting the said Thomas M. Shirley was present and participated, a resolution of said board was unanimously adopted authorizing the issuance by said company of a series of bonds
217 of one thousand dollars each, at the rate of $20,000 to each mile of completed road, commencing at Bremond and thence along the line of the said Waco and Northwestern Railroad, and the making and execution and delivery of a deed of trust conveying said

Waco and Northwestern Railroad, etc., and also six thousand acres of land per mile out of the land grant of sixteen sections of land per mile donated by the state of Texas to aid in the construction of the said Waco and Northwestern Railroad; that the said bonds and deed of trust were in conformity with said resolution afterwards issued and disposed of to various capitalists investing therein. A printed copy of said deed of trust containing a description of such bonds so authorized to be issued and issued is herewith filed for reference and marked "Exhibit F." That by reason of acquiescence of the said Thomas M. Shirley in the matters and things hereinbefore set forth; by reason of his active participation in the said several matters and things, and the actings and doings of this defendant in relation to the construction and building of said Waco and Northwestern Railroad; by his approval of the purchase thereof at the said sale under the said deed of trust; by his acqui-
218 escence and approval of the issuance of said bonds and the mortgage of the said road and bonds granted to aid in the construction thereof, which he, the said Shirley, plaintiff herein, did while acting as a director for this defendant, and as a member of the executive committee of said board, he ought not now to be admitted or heard to question or impeach either one or any of the actings and doings of this defendant in the premises, or to assert that this defendant was acting without authority therein, or that any of its actings and doings in the premises were *ultra vires*.

17th. That in all the actings and doings of this defendant in and about the premises, from the time of entering into said original contract, "Exhibit A," until the final execution thereof, and the completion of said road according to agreement, and the purchase of the same and the other property under said deed of trust, has been characterized by the utmost good faith and fair dealing towards the said plaintiff and the world, and this defendant denies that it has been guilty of any act, open or covert, or of any fraud, actual or
219 constructive, of which the said Shirley has any grounds or right to complain against this defendant, or have any relief from it upon any principle of law or equity. This defendant denies that it has now in its possession or under its control, or has ever had in its possession or under its control, any of the property, rights, choses in possession or in action, privileges, or franchises, of the said Waco and Northwestern Railroad company, upon which the said plaintiff has now, or has at any time ever had, any lien or charge, legal or equitable, for the payment of any claim, real or pretended, which he has or may assert. It denies that any of the property of any kind, nature, or description, rights, privileges, franchises, or other thing whatsoever, of the said Waco and Northwestern Railroad company, came into the possession, or under the control, or was merged in this defendant, the Houston and Texas Central Railway company, by the said act of merger hereinbefore referred to, but that all of the property of the said Waco and Northwestern Railroad company, its rights, privileges, and franchises, which did in fact come into the

possession of this defendant, was acquired by this defendant,
220 and had been in its possession and under its control and management, and this defendant had been in the enjoyment thereof long before the said acts were passed and approved, and only object, intent, purpose and effect of said act was to have and obtain legislative sanction to the transfer and assignment which had then already been made, the state of Texas then being the only party in a position to make objection to such transfer and assignment.

18th. And this defendant now avers that all and singular the property, rights, privileges, and franchises of the said Waco & Northwestern Railroad company which has ever come into the possession and control of this defendant at any time, was acquired by it under and in virtue of said contracts aforesaid, and by purchase under said deed of trust; and this defendant, as respects all and singular the said property so acquired by it, occupying the position of, and is a purchaser in good faith, for valuable consideration paid, without notice of any adverse right, title, or legal claim, if any such
221 in fact exist. All of which matters and things herein set forth and pleaded the defendant is ready to verify, &c.

GEO. GOLDTHWAITE,
Att'y for def't H. & T. C. R. W. Co.

(Endorsement:) Amended answer; No. 1779; T. M. Shirley *vs.* The Waco Tap Railroad company et al.; amended answer of H. and T. C. R. W. co.; Filed Dec. 29th, 1877; Chas. R. Beatty, clk. D. C. McL. co., Tex., by E. W. Pew, dep'ty; Geo. Goldthwaite, att'y.

222 *Amended Answer Houston and Texas Central Railway Co.*—Jan'y 16, '78.

In district court McLennan county.

Thomas M. Shirley
vs.
The Waco Tap R. R. Co. et al. } No. 1779.

And now comes the Houston and Texas Central Railway company, and by leave of court first had, and amends its demurrer and answer herein filed, and for amendment—

1st. It demurs specially to the plaintiff's petition, as exhibited against this defendant, and to each and every allegation of
223 fact therein contained and set forth, because it appears of record herein that this defendant was not made a party to this suit until the 22d day of April, A. D. 1876, when, to the end and purpose of making this defendant a party to this suit, the defendant filed his amended petition of that date. That upon the two several supplemental petitions filed, respectively, on December 16th, A. D. 1872, and December 17th, A. D. 1872, no process was sued out by the said plaintiff against this defendant, & no appearance thereto was made by this defendant; and that during the two years then next

ensuing the said plaintiff prosecuted his suit against the original defendant, the Waco Tap Railroad company, to two trials, to wit, one at the April term, A. D. 1874, and one at the December term, A. D. 1874, upon the merits and the issues made between the original parties, the said Thomas M. Shirley and the said Waco Tap Railroad company, and the said amendments were so repudiated and abandoned by the said plaintiff, and there was no *lis pendens* against this
224 defendant until long afterwards, to wit, on the 22d day of April, A. D. 1876, when the plaintiff's amended petition of that date was filed, and so this defendant says that the supposed cause of action set forth by the said plaintiff against this defendant accrued more than two years next before the institution of this suit against this defendant, and the said plaintiff his action aforesaid against this defendant did not commence and sue within two years next after the cause of such action or suit, and this the defendant is ready to verify; wherefore the defendant says the same is barred by the statute of limitation of two years, and prays judgment of the court, &c.

2nd. Again comes said defendant and specially demurs and says that the said supposed cause of action set forth by the said plaintiff against this defendant accrued more than four years next before the institution of this suit against this defendant, and the said plaintiff his action aforesaid against this defendant did not commence
225 and sue within four years next after the cause of such action or suit, and this the defendant is ready to verify; wherefore this defendant says this suit is barred by the statute of limitation, and of this prays judgment of the court, &c.

THE HOUSTON & TEXAS CENTRAL RAILWAY COMPANY,
By GEO. GOLDTHWAITE, *Att'y.*

And again the said defendant, the Houston & Texas Central Railway company, and by leave of the court amends its original answer herein filed, and for amendment says: That this defendant was not made a party to this suit until the 22d day of April, A. D. 1876, when to that end and purpose the said plaintiff filed his amended petition of that date.

That on the 16th day of December, A. D. 1872, and on the 17th day of December, A. D. 1872, the said plaintiff filed two several supplemental petitions with the view to making this defendant a party —— this suit, but that said plaintiff sued out no process on said supplemental petitions against this defendant, and this defendant
226 had no notice thereof, either actual or constructive, and made no appearance herein, and during the two years next succeeding, the said plaintiff prosecuted his suit against the original defendant, the Waco Tap Railroad company, to two trials, to wit, one trial at the April term, A. D. 1874, and one trial at the December term, A. D. 1874. That said trials were so had upon the merits of the case and the issues joined between the original parties, to wit, between the said Thomas M. Shirley and the said Waco Tap Railroad company,

and the said amended or supplemental petitions of 16th and 17th December, A. D. 1874, were repudiated and abandoned by the said plaintiff, and there was no pending litigation against this defendant until the 22nd of April, A. D. 1876, when the plaintiff's amended petition of that date was filed, and in answer to which this defendant is now before this court; and this defendant says that the supposed cause of action set forth by the said plaintiff against this de-
227 fendant accrued more than two years next before the institution of this suit against this defendant, and the said plaintiff his action aforesaid against this defendant did not commence and sue within two years after the cause of said action or suit, and this this defendant is ready to verify, &c.; wherefore this defendant says that the same is barred by the statute of limitation of two years.

GEO. GOLDTHWAITE,
For said Def't.

And again comes said defendant, and for further plea and answer herein reiterates the matters of fact set forth *set forth* in the last preceding plea, and thereupon says that the said supposed cause of action set forth by the said plaintiff against this defendant in his numerous petitions, amended petitions, and supplemental petitions accrued more than four years next before the institution of this suit, and the said plaintiff his action aforesaid against this defendant did not commence and sue within four years next after the cause
228 of such action or suit, and the same is barred by the statute of limitation in such cases made and provided, and this the defendant is ready to verify, &c.

THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,
By GEO. GOLDTHWAITE, *Attorney.*

(Endorsement :) 1779; Thomas M. Shirley *v.* Waco Tap R. R. co. et al.; amended answer of H. & T. C. R. W. co.; filed Jan. 16, 1878; Chas. R. Beatty, cl'k D. C., McL. co., Tex.; by E. P. Pew, dept'y.

229 *Mandate.*

The state of Texas to the district court of McLennan county, greeting:

Before our supreme court of the 28th day of December, A. D. 1875, the cause upon appeal to revise or reverse your judgment between the Waco Tap Railroad Co., appellant, and Thomas M. Shirley, appellee, was determined; and therein our said supreme court made its order in these words: No. 2845. "This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment of the court below, it is considered, adjudged and ordered that the judgment of the court below be reversed and the

cause remanded for further proceedings in accordance with the opinion of this court; that the defendant in error pay all costs in this behalf expended, and this decision be certified below for observance."

Wherefore we command you to observe the order of our
230 said supreme court in this behalf, and in all things to have it duly recognized, obeyed and executed.

Witness the Hon. O. M. Roberts, presiding judge of our said supreme court, with the seal thereof annexed, at Austin, this the 16th day of March, A. D. 1877.

[SEAL SUPREME COURT.] W. P. DE NORMANDIE, *Clerk.*

(Endorsement:) T. M. Shirley *vs.* Waco Tap R. R. co. Mandate. Filed Nov. 5, 1877. Chas. R. Beatty, cl'k d. c., McL. co., Texas.

Mandate.

The state of Texas to the district court of McLennan county, greeting:

Before our supreme court on the 16th day of January, A. D. 1880, the cause upon appeal to revise or reverse your judgment between the Houston and Texas Central Railroad Company, No. 804,
231 *vs.* Thomas M. Shirley, was determined; and therein our supreme court made its order in these words: "This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be reversed and the cause remanded for further proceedings in accordance with the opinion of this court; that the appellant, the Houston & Texas Central Railroad company, do have and recover of and from the appellee, Thomas M. Shirley, all costs in this behalf expended, and this decision be certified below for observance.

Wherefore we command you to observe the order of our said supreme court in this behalf; and in all things to have it duly recognized, obeyed, and executed.

Witness the Hon. George F. Moore, chief justice of our said supreme court, with the seal thereof annexed, at Tyler, this 28th day of June, A. D. 1881.

[SEAL SUPREME COURT.] S. D. REAVES, *Clerk.*

232 (Endorsement:) No. 804; mandate supreme court, Tyler, H. & T. C. R. R. Company *vs.* Thomas M. Shirley; issued June 28, 1881; S. D. Reaves, clerk; —— ——, deputy; filed Aug. 19, 1881; Z. F. Beasley, clerk D. C., McL. county, Texas, by O. W. David, deputy.

233 *Citation to W. R. Kellum.*

The state of Texas to the sheriff or any constable of McLennan county, greeting:

You are hereby commanded that you summon W. R. Kellum to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston & Texas Central Railway company of Texas, & W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779; the nature of which demand is as follows, to wit:

Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, & A. Groesbeck, late directors of the Waco & Northwestern Railroad company. The original petition having been filed July 16th, 1870, against Waco

234 Tap Railroad, which afterwards changed its name to Waco & Northwestern Railroad company, in damages of $300,000 actual and exemplary for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company. The Houston & Texas Central Railway company made party defendant April 23d, 1876, it having acquired all the property of W. & N. W. R. company through fraud & collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed Nov'r 10th, 1881, alleging as original, prays that all land grants & all other property of late W. & N. W. R. company now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees & the W. & N. W. R. company for pl't'ff's debt, damages, &c., to be satisfied by said trustees out of the assets & property that shall come to their hands, and you will deliver to the said W. R. Kellum a true copy of this citation, together with the accompanying certified copy of pl't'ff amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return, as the law directs.

235 Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18th day of April, 1882.

Attest:

[SEAL.] Z. F. BEASLEY.

Clerk District Court, McLennan county, Texas.

(Endorsement:) No. 1779; T. M. Shirley *vs.* Waco Tap R. R. co. et al; citation to W. R. Kellum; issued April 18th, 1882; Z. F. Beasley, clerk district court, McLennan county.

Came to hand on the 19th day of April, at 10 o'clock a. m., A. D. 1882, and executed on the 19th day of April, A. D. 1882, by delivering to the defendant W. R. Kellum in person a true and correct copy of this citation and the accompanying certified copy of pl'ff's petition.

VAN HALL,
Sheriff McLennan county, Texas.

236 Sheriff's fee paid..... $1 50
Mileage.....

Total..... $

Citation to W. R. Baker.

The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon W. R. Baker to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston & Texas Central Railway company of Texas, and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779, the nature of which demand is as follows, to wit:

237 Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. A. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond and A. Groesbeck, as trustees and late directors of the Waco and Northwestern Railroad company. The original petition having been filed July 16, 1870, against Waco Tap Railroad, which afterwards changed its name to Waco and Northwestern Railroad company, in damages of $300,000, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of W. T. R. company. The Houston and Texas Central Railway company made party defendant April 23d, 1876, it having acquired all the property of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed Nov. 10, 1881, alleging as original, prays that all land grants and all other property of the late W. & N. W. R. company now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees and the W. & N. W. R. company for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets and property that shall come to their hands, and you will deliver to the said W. R. Baker, in person, a true copy of this citation, together
238 with the accompanying certified copy of pl'ff amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this 18th day of April 1882.

[SEAL.] Attest: Z. F. BEASLEY,
Clerk District Court, McLennan county, Texas.

(Endorsement:) No. 1779; T. M. Shirley *versus* Waco Tap Railroad company et al.; citation to W. R. Baker; issued April 18th, 1882; Z. F. Beasley, clerk district court, McLennan county, per ——— ———, deputy.

Came to hand on the 21st day of April, 1882, at 5 o'clock p. m., and executed April 24th, 1882, by delivering to the within
239 named defendant, W. R. Baker, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

C. M. NOBLE,
Sheriff of Harris county.
By J. J. FANT,
Deputy.

Citation to W. J. Hutchings.

The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon W. J. Hutchings to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the first Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston and Texas
240 Central Railway company of Texas, and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeeck, for suit numbered 1779; the nature of which demand is as follows, to wit: Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond and A. Groesbeck, as trustees and late directors of the Waco and Northwestern Railroad company, the original petition having been filed July 16, 1870, against Waco Tap Railroad, which afterwards changed its name to Waco and Northwestern Railroad company, in damages of $300,000, actual and exemplary, for breach of contract by the Waco Tap Railroad company, to construct the road of the W. T. R. company. The Houston and Texas Central Railway company made party defendant April 23, 1876, it having acquired all the property

of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed November 10th, 1881, alleging as original, prays that all land grants and all other property of late W. & N.
241 W. R. company, now held by the H. & T. C. R. company, be declared assets in the hands of said trustees; and for judgments against said trustees & the W. & N. W. & R. company for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets & property that shall come to their hands; and you will deliver to the said W. J. Hutchings in person a true copy of this citation, together with the accompanying certified copy of pl'ff amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18th day of April, 1882.

[SEAL.] Attest: Z. F. BEASLEY,
Clerk dist. court, McLennan county, Texas.

(Endorsement:) No. 1779; T. M. Shirley versus Waco Tap R. R. company et al.; citation to W. J. Hutchings; issued April 18,
242 1882; Z. F. Beasley, clerk district court, McLennan co.

Came to hand on the 21st day of April, 1882, at 5 o'clock p. m., and executed April 24th, 1882, by delivering to the within named defendant, W. J. Hutchings, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

C. M. NOBLE,
Sh'ff of Harris Co.,
By J. J. FANT, *Deputy*.

Citation to Paul Bremond.

The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon Paul Bremond to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Mon-
day in May, A. D. 1882, then and there to answer the amended
243 consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1882, against the Waco Tap Railroad company of Texas, with the Houston & Texas Central Railway company of Texas, and W. R. Baker, W. J. Hutchins, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779, the nature of which demand is as follows, to wit: Against W. R. Baker, W. S. Hutchins, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A.

Rice, Paul Bremond, and A. Groesbeck, as trustees and late directors of the Waco & Northwestern Railroad company. The original petition having been filed July 16th, 1870, against Waco Tap Railroad company, which afterwards changed its name to Waco and Northwestern Railroad company, in damages of $300,000, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company. The Houston and Texas Central Railway company made party defendant April 23d, 1876, it having acquired all the property of W. & N. W. R. company through
244 fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed Nov. 10th, 1881, alleging as original, prays that all land grants and other property of late W. & N. W. R. company, now held by the H. & T. C. R. company, be declared assets in the hands of said trustees, and for judgment against said trustees and the W. & N. W. R. company for plaintiff's debt, damages, &c., to be satisfied by said trustees out of the assets and property that shall come to their hands, and you will deliver to the said Paul Bremond in person a true copy of this citation, together with the accompanying copy of plaintiff's amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18th day of April, 1882.

[SEAL.] Attest: Z. F. BEASLEY,
Clerk district court, McLennan county, Texas.

245 (Endorsement:) No. 1779; T. M. Shirley vs. Waco Tap R. R. company et al.; citation to Paul Bremond; issued April 18, 1882; Z. F. Beasley, clerk district court McLennan county.

Came to hand on the 21st day of April, 1882, at 5 o'clock p. m., and executed April 24th, 1882, by delivering to the within-named defendant, Paul Bremond, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

C. M. NOBLE,
Sh'ff of Harris Co.
By J. J. FANT, *Deputy.*

Citation to F. A. Rice.

246 The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon F. A. Rice to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof, in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer to the

amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston and Texas Central Railway company of Texas & W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779, the nature of which demand is as follows, to wit:

Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, & A. Groesbeck, as trustees & late directors of the Waco and Northwestern Railroad company, the original petition having been filed July 16th, 1870, against Waco Tap Railroad, which afterwards changed its name to Waco & Northwestern Railroad Company, in dam-
247 ages of $300,000.00, actual and exemplary, for breach of contract by the Waco Tap Railroad to construct the road of the W. T. R. C. The Houston & Texas Central Railway company made party defendant April 23d, 1876, it having acquired all the property of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition, filed Nov. 10th, 1881, alleging as original, prays that all land grants & all other property of late W. & N. W. R. company, now held by the H. & T. C. R. company, be declared assets in the hands of said trustees, and for judgment against said trustees & the W. & N. W. R. company for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets & property that shall come to their hands, and you will deliver to the said T. A. Rice in person a true copy of this citation, together with the accompanying certified copy of pl'tf's amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs. Issued under my
248 hand and the seal of the district court of McLennan county, Texas, at office in Waco, on this the 18th day of April, 1882.

Attest: Z. F. BEASLEY,

[SEAL.] *Clerk district court, McLennan county, Texas.*

(Endorsement:) No. 1779; T. M. Shirley *versus* Waco Tap R. R. Co. et al.; citation to F. A. Rice, issued April 18th, 1882; Z. F. Beasley, clerk dist. court, McLennan county, per —— ——, deputy.

Came to hand on the 21st day of April, 1882, at 5 o'clock p. m., and executed April 24th, 1882, by delivering to the within-named defendant, F. A. Rice, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

249 C. M. NOBLE,
Sheriff of Harris county.
By J. J. FANT,
Deputy.

Citation to A. Groesbeck.

The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon A. Groesbeck to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston & Texas Central Railway company of Texas and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. A. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779, the nature of which demand is as follows, to wit:

Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke,
250 J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, and A. Groesbeck, as trustees and late directors of the Waco and Northwestern Railroad company. The original petition having been filed July 16th, 1870, against the Waco Tap Railroad, which afterwards changed its name to Waco and Northwestern Railroad company, in damages of $300,000.00, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company. The Houston and Texas Central Railway company made partly def't April 23, 1876, having acquired all the property of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed Nov. 10th, 1881, alleging as original, prays that all land grants, and all other property of late W. & N. W. R. company, now held by the H. & T. C. R. company, be declared assets in the hands of said trustees and the W. & N. W. R. company, for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets and property that shall come to their hands, and you will deliver to the said A. Groesbeck,
in person, a true copy of this citation, together with the
251 accompanying certified copy of pl'tf amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18th day of April, 1882.

Attest: Z. F. BEASLEY,
[SEAL.] *Clerk dist. court McLennan county, Texas.*

(Endorsement:) No. 1779; T. M. Shirley *versus* Waco Tap R. R. company et al.; citation to A. Groesbeck; issued April 18, 1882; Z. F. Beasley, clerk district court, McLennan co.

252 Came to hand April 21st, 1882, at 5 o'clock p. m., and executed April 24th, 1882, by delivering to the within named defendant, A. Groesbeck, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

C. M. NOBLE,
Sheriff of Harris county.
By J. J. FANT,
Deputy.

Citation to R. M. Elgin.

The state of Texas to the sheriff or any constable of Harris county, greeting:

You are hereby commanded that you summon R. M. Elgin to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston and Texas Central Railway
253 company of Texas, and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779; the nature of which demand is as follows, to wit:

Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, and A. Groesbeck, as trustees and late directors of the Waco & Northwestern Railroad company. The original petition having been filed July 16, 1870, against Waco Tap Railroad, which afterwards changed its name to Waco & Northwestern Railroad company, in damages of $300,000, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company. The Houston & Texas Central Railway company made party def't April 23, 1876, it having acquired all the property of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition filed Nov. 10th, 1881, alleging as original, prays that all land grants and all other property of late W. & N. W. R company
254 now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees & the W. & N. W. R. company for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets & property that shall come to their hands; and you will deliver to the said R. M. Elgin in person a true copy of this citation, together with the accompanying certified copy of pl't'ff's amended consolidated petition.

Herein fail not, but of this writ, and how you have executed the same, make due return as the law directs.

Issued under my hand & the seal of the district court of McLen-

nan county, Texas, at office in Waco, this the 18th day of April, 1882.

[SEAL.] Attest. Z. F. BEASLEY,
Clerk District Court, McLennan county, Texas.

255 (Endorsement:) No. 1779; T. M. Shirley *versus* Waco Tap R. R. company *et al.*; citation to R. M. Elgin; issued April 18th, 1882; Z. F. Beasley, clerk district court, McLennan co.

Came to hand on the 21st day of April, 1882, at 5 o'clock p. m., and executed April 24, 1882, by delivering to the within named defendant, R. M. Elgin, in person, a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition.

C. M. NOBLE,
Sheriff of Harris co.
By J. J. FANT, *Deputy.*

256 *Citation to C. Ennis.*

The state of Texas to the sheriff or any constable of Galveston county, greeting:

You are hereby commanded that you summon C. Ennis, a citizen of Harris county, Texas, but temporarily at Galveston, to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston & Texas Central Railway company of Texas, & W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, & A. Groesbeck, as trustees & late directors of the Waco & Northwestern Railroad Company, the original
257 petition having been filed July 16th, 1870, against Waco Tap Railroad company, which afterwards changed its name to Waco & Northwestern Railroad company, in damages of $300,000.00, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company. The Houston & Texas Central Railroad company made party def't April 23d, 1876, it having acquired all the property of W. & N. W. R. company through fraud and collusion, as alleged, with said W. & N. W. R. company. The amended consolidated petition, filed Nov. 10th, 1881, alleging as original, prays that all land grants & all other property of late W. & N. W. R. company now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees & W. & N. W. R. company for pl'ff's debt, damages, &c., to be satisfied by said trustees out of the assets & property that shall come

to their hands, and you will deliver to the said C. Ennis, in person, true copy of this citation, together with the accompanying certified copy of pl't'ff's amended consolidated petition.

Herein fail not, but of this writ, and how you have exe-
258 cuted the same, make due return as the law directs.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18th day of April, 1882.

Attest: Z. F. BEASLEY,
[SEAL.] *Clerk District Court McLennan county, Texas.*

(Endorsement:) No. 1779; T. M. Shirley *versus* Waco Tap R. R. company et al.; citation to C. Ennis; issued April 18th, 1882; R. T. Beasley, clerk district court McLennan co., per —— ——, deputy.

Received this writ on the 22d day of April, 1882, at 9 a. m., and I executed the same on the 24th day of April, 1882, by delivering to the within named defendant, C. Ennis, in person, in the
259 city and county of Galveston, a true copy of this writ and a certified copy of plaintiff's petition, which accompanied the same.

WM. P. OWENS,
Sheriff G. C.

Sheriff fee, $1.50, paid by plaintiff.

Citation to R. Coke.

The state of Texas to Richard Coke, a citizen of McLennan county, Texas, but now temporarily absent at Washington, D. C.:

You are hereby notified to be and appear before the honorable district court of McLennan county, Texas, at the court-house thereof in the city of Waco, on the first Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston and Texas Central Railway company of Texas, and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groes-
260 beck, for suit numbered 1779, the nature of which demand is as follows, to wit: Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, and A. Groesbeck, as trustees and late directors of the Waco & Northwestern Railroad company. The original petition having been filed July 16th, 1870, against Waco Tap Railroad, which afterwards changed its name to Waco & Northwestern Railroad company, in damages of $300,000.00, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. company.

The Houston & Texas Central Railway company made party defendant, April 23d, 1876, it having acquired all the property of W. & N. W. R. company, through fraud and collusion, as alleged, with said W. & N. W. R. Co. The amended consolidated petition filed——, 1881, alleging, as original prays, that all land grants and all other property of late W. & N.W. R. company, now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees the W. & N. W. R. company for plaintiff's debt, damages, &c., to be satisfied by said trustees out of the assets and property that shall come to their hands. A
261 certified copy of plaintiff's amended consolidated petition accompanies this notice, a true copy of this citation.

Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this the 18 day of April, 1882. Attest:

[SEAL.] Z. F. BEASLEY,
Clerk district court, McLennan county, Texas.

(Endorsement:) No. 1779. T. M. Shirley *versus* the Waco Tap Railroad company et al. Notice to Richard Coke.

THE DISTRICT OF COLUMBIA.

Before me, Return J. Meigs, clerk of the supreme court of the District of Columbia, the said court being a court of record and having a seal, personally appeared Frederick W. Jones, who
262 is to me known, and he being by me duly sworn, on his oath, states that the within notice to Richard Coke was served by him and was executed on the 24th day of April, A. D. 1882, by delivering to the defendant, Richard Coke, in person, a true copy of the within notice, together with a copy of the plaintiff's amended consolidated petition accompanying the same; and he further states that he is in no way interested in the suit nor related to the parties, or either of them, and that he is disinterested and a person competent to make oath.

F. W. JONES.

Sworn to and subscribed before me by Frederick W. Jones, whom I certify is a credible person and competent to make oath. Given under my hand and seal of office, at office in Washington city, this the 24th day of April, A. D. 1882.

[SEAL.] R. J. MEIGS,
Clerk of the Supreme Court of the District of Columbia.

Citation to John T. Flint.

263 The state of Texas, to the sheriff or any constable of McLennan county, greeting:

You are hereby commanded that you summon John T. Flint to be and appear before the honorable district court of McLennan

county, Texas, at the court-house thereof in the city of Waco, on the 1st Monday in May, A. D. 1882, then and there to answer the amended consolidated petition of T. M. Shirley, filed in said court on the 10th day of November, A. D. 1881, against the Waco Tap Railroad company of Texas, with the Houston and Texas Central Railway company of Texas, and W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, F. A. Rice, Paul Bremond, A. Groesbeck, for suit numbered 1779; the nature of which demand is as follows, to wit:

Against W. R. Baker, W. J. Hutchings, C. Ennis, R. Coke, J. T. Flint, W. R. Kellum, R. M. Elgin, and F. A. Rice, Paul Bremond, and A. Groesbeck, as trustees and late directors of the Waco and Northwestern Railroad company, the original petition having been filed July 16, 1870, against Waco Tap Railroad, which
264 afterwards changed its name to Waco & Northwestern Railroad company, in damages of $300,000, actual and exemplary, for breach of contract by the Waco Tap Railroad company to construct the road of the W. T. R. C. The Houston & Texas Central Railway company made party defendant April 23d, 1876, it having acquired all the property of W. & N. R. company through fraud and collusion, as alleged with said W. & N. W. R. company, the amended consolidated petition filed Nov. 10, 1881, alleging, as original prays, that all land grants and all other property of late W. & N. W. R. company now held by the H. & T. C. R. company be declared assets in the hands of said trustees, and for judgment against said trustees and the W. & N. W. R. company, for plaintiff's debt, damages, &c., to be satisfied by said trustees out of the assets and property that shall come to their hands; and you will deliver to the said John T. Flint a true copy of this citation, together with the accompanying certified copy of plaintiff's amended consolidated petition. Herein fail not, but of this and how you have executed the same make due return, as the law directs.

265 Issued under my hand and the seal of the district court of McLennan county, Texas, at office in Waco, this 18th day of April, 1882.

Attest:

[SEAL.] Z. F. BEASLEY,
Clerk district court, McLennan county, Texas.

(Endorsed:) No. 1779. T. M. Shirley *vs.* Waco Tap R. R. Co. et. al. Citation. To J. T. Flint. Issued April 18th, 1882. Z. T. Beasley, clerk district court, McLennan county, Texas.

Came to hand on the 19th day of April, at 10 o'clock a. m., A. D. 1882, and executed on the 19 day of April, A. D. 1882, by delivering to the defendant, John T. Flint, in person, a true and correct copy of this citation and the accompanying certified copy of plaintiff's petition.

VAN HALL,
Sheriff, McLennan county, Texas.

Sheriff's fee paid, $1.50.

266 *Citation to Waco Tap R. R.*

The state of Texas to the sheriff or any constable of McLennan county, greeting:

You are hereby commanded to summon the Waco Tap Railroad Company to be and appear before the honorable district court of McLennan county, at the court-house in Waco, on the 12th, —— Monday after the 1st Monday in September, A. D. 1870, then and there to answer the petition of Thomas M. Shirley, now on file in said court, against the Waco Tap Railroad company, a certified copy of which petition accompanies this citation.

Herein fail not, but of this writ make due return.

Witness, D. F. DAVIS,
Clerk of the district court of McLennan county, Texas.

Given under my hand and the seal of said court, at office in Waco, this the 16th day of July, A. D. 1870.

[SEAL.] D. F. DAVIS,
Clerk D. C., McL. co., Tex.
By JNO. L. DYER, *Deputy.*

(Endorsement:) No. 1770; T. M. Shirley *vs.* Waco Tap
267 Railroad company; citation to Waco Tap R. R. Co.; issued July 16, A. D. 1870; D. F. Davis, clk. D. C., McL. co., by Jno. L. Dyer.

Came to hand July 16th, 1870, and executed same day by delivering to Jno. T. Flint, in person, the president of the within designated Waco Tap Railroad company, a certified copy of the within citation, and a copy of the petition accompanying it, this July 16, 1870.

W. H. MORRIS,
Sheriff McL. co., Tex.
By S. M. GLENN, *Dep'y.*

Sheriff's fee, $1.50.

268 *Answer and Demurrer.*

In the district court of McLennan county.

Thomas M. Shirley
vs. } No. 1779.
The Waco Tap R. R. Co.

And now come Richard Coke, W. R. Baker, Wm. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, and A. Groesbeck, who have been made parties defendant herein, and demur to the plaintiff's petition, and say that the said petition and the matters and things therein contained are not sufficient in law to require these defendants to make other or further answer herein,

and this they are ready to verify, and they pray judgment of the court whether, &c.

GEO. GOLDTHWAITE,
ALEXANDER & WINTER,
for said defendants.

(Endorsed, to wit:) No. 1779; Thomas M. Shirley *vs.* Waco Tap R. R. Co.; appearance & demurrer; filed May 6th, 1882; Z. F. Beasley, cl'k D. C., McL. co., Tex.

269 *Petition for removal to U. S. court.*

In the district court of McLennan county, state of Texas.

Thomas M. Shirley
vs.
Waco Tap Railroad company. } No. 1779.

Petition for removal to the circuit court of the United States for the northern district of Texas, at Waco.

To the honorable the district court of McLennan county, Texas:

Your petitioners, John T. Flint, W. R. Kellum, Richard Coke, Wm. R. Baker, Wm. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, and A. Groesbeck respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of cost, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different states, and that petitioners were at the time of the commencement of this suit against them, to wit, on the 10th day of November, A. D. 1881, and still are citizens of the state of Texas; and that
270 the plaintiff herein, Thomas M. Shirley, was then and still is a citizen of the state of New York.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in said circuit court of the United States for the northern district of Texas, at Waco, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And they pray this honorable to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the northern district of Texas, at Waco, and will ever pray, &c.

And at the same time comes also the Houston and Texas Central Railway company, and says that it is a corporation chartered by the legislature of the state of Texas, and a citizen of said
271 state of Texas, and it makes itself a party to the above and foregoing petition for the removal of this cause to the circuit

court of the United States for the northern district of Texas, at Waco, and to that end and purpose it joins with its co-defendants herein, the said John T. Flint et al., trustees of the said sold-out company, the Waco & Northwestern Railroad company, in their petition for removal. And whilst said defendant, the Houston & Texas Central Railway company, denies all and every liability whatsoever to said plaintiff, it says that this suit or action as against it is purely incidental and collateral to and wholly depends upon the plaintiff's right to recover in his said suit or action against its co-defendants herein, the said John T. Flint et al., trustees of said sold-out company, the Waco and Northwestern Railroad company, for damages for breach of contract by said sold-out company, now represented by said Flint et al., trustees.

That the main and essential controversy in this case is between the said plaintiff and the said trustees, John T. Flint et al.,
272 principal petitioners herein.

That, as of record is manifest, no liability can attach to or be imposed upon this defendant, the said Houston and Texas Central Railway company, until after the said plaintiff shall have first established his claim to damages in his main suit against the said John T. Flint et al., trustees, for the breach of contract and other causes of complaint alleged in his petition.

And the said defendant, The Houston and Texas Central Railway company, joines with their said co-defendants in their bond for removal of this cause, and they pray, as their said co defendants have above prayed, etc.

GEO. GOLDTHWAITE,
ALEXANDER & WINTER,
Atty's for Petitioner.

STATE OF TEXAS, }
County of McLennan. }

I, Geo. Goldthwaite, being duly sworn, do say that I am an attorney for the petitioners in the above-entitled cause; that I know the contents of the foregoing petition, and that the statements and allegations therein contained are true, as I verily believe.
273

GEO. GOLDTHWAITE.

Sworn to and subscribed before me by Mr. Goldthwaite this 20th day of May, 1882.

[SEAL.]

Z. F. BEASLEY,
Clerk D. C. McL. co., Tex.

(Endorsement on petition for removal to U. S. circuit court:) No. 1779; Thomas M. Shirley *vs.* Waco Tap R. R. Co. et al.; petition for removal to U. S. circuit court; filed May 20, 1882; Z. F. Beasley, cl'k D. C. McL. co., Tex.; Geo. Goldthwaite, Alexander & Winter, att'ys.

Bond for Removal.

Thomas M. Shirley
vs.
Waco Tap Railroad Co. et al. } No. 1779.

Know all men by these presents that we, John T. Flint, Wm. R. Kellum, Richard Coke, Wm. R. Baker, W. J. Hutchings, F. A. Rice, R. M. Elgin, Paul Bremond, Cornelius Ennis, and A. Groes-
274 beck, trustees, and The Houston & Texas Central Railway company as principals, and Geo. W. Cleveland and W. H. Roper and Travis Jones as sureties, are held and firmly bound unto Thomas M. Shirley in the penal sum of one thousand dollars, the payment whereof, well and truly to be made unto the Thomas M. Shirley, his heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: the said John T. Flint, Wm. R. Kellum, Richard Coke, Wm. R. Baker, W. J. Hutchings, F. A. Rice, R. M. Elgin, Paul Bremond, Cornelius Ennis, and A. Groesbeck, having petitioned the district court of McLennan county, in the state of Texas, for the removal of a certain cause therein pending, wherein Thomas M. Shirley is plaintiff and the said John T. Flint, Wm. R. Kellum, Richard Coke, W. R. Baker, W. J. Hutchings, F. A. Rice, R. M. Elgin, Paul Bremond, Cornelius Ennis, and A. Groesbeck, trustees, and the Houston and Texas Central Railway company are defendants, to the circuit court of the United
275 States for the northern district of Texas, at Waco;

Now, if the said defendants above named, your petitioners, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands this, the 20th day of May, A. D. 1882.

JOHN T. FLINT,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
W. R. KELLUM,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
RICHARD COKE,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
W. R. BAKER,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
W. J. HUTCHINGS,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.

276 F. A. RICE,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
R. M. ELGIN,
By GEO. GOLDTHWAITE,
His agent and att'y in fact.
CORNELIUS ENNIS,
By his agent and attorney in fact,
GEO. GOLDTHWAITE.
A. GROESBECK,
By his agent and attorney in fact,
GEO. GOLDTHWAITE.
PAUL BREMOND,
By his agent and attorney in fact,
GEO. GOLDTHWAITE.
THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY,
By its agent and attorney in fact,
GEO. GOLDTHWAITE.
G. W. CLEVELAND, *surety.*
W. H. ROPER, *surety.*
TRAVIS JONES, *surety.*

(Endorsed:) No. 1779; Thomas M. Shirley *vs.* Waco Tap R. R. Co. et al.; bond for removal; filed and approved May 20th, 1882; Z. F. Beasley, cl'k D. C. McL. co., Tex.

277 *Judgment on removal to United States Court.*

T. M. Shirley *vs.* Waco Tap R. R. Co. et al. } No. 1799.

On this the 29th day of June, 1882, came on to be heard the petition of defendants for the removal of this cause to the U. S. circuit court for the northern district of Texas, and said petition being heard and understood by the court, is in all things granted, to which ruling of the court, plaintiff in open court excepts, and gives notice of appeal to our supreme court.

Clerk's certificate to record from district court McLennan county, Texas, to U. S. circuit court at Waco is in words, to wit:

THE STATE OF TEXAS, }
McLennan county. }

I, Z. F. Beasley, clerk of the district court in and for said county and state, do hereby certify that the above and foregoing pages 1 to 1706, inclusive, contains a true and correct copy of all pro-
278 ceedings had and done in said district court in cause No. 1779, "T. M. Shirley *vs.* Waco Tap Railroad company," and

also a true and correct copy of all the papers in said cause now on file in my office.

Witness my hand officially, and the seal of said court affixed at office in the city of Waco this the 2d day of October, A. D. 1882.

[SEAL.] Z. F. BEASLEY,
Clerk D. C. McL. co., Texas.

279 The United States circuit court, 5th circuit in and for the northern district of Texas, at Waco.

Be it remembered, that at a term of the circuit court of the United States, 5th district, northern district of Texas, held at Waco, for the April term, A. D. 1883—Hon. Don A. Pardee, circuit judge, presiding—among other, the following proceedings were had:

United States of America, circuit court of the United States, 5th circuit and northern district of Texas, at Waco, Hon. Don A. Pardee, circuit judge; Hon. A. P. McCormick, district judge.

Be it remembered that on the 2d day of October, A. D. 1882, that the defendant filed in the United States circuit court, 5th circuit and northern district of Texas, at Waco, the transcript of the case of

Thomas M. Shirley
vs.
The Waco Tap Railroad Company et als. } No. 92.

Filed October 2d, 1882.

J. H. FINKS, *U. S. circuit clerk.*

280 *Motion to remand.*

[Endorsed, to wit: No. 92, U. S. cir. court, T. M. Shirley vs. Waco Tap R. R. Co., et al.; motion to remand, filed Oct. 6th, 1882. J. H. Finks, clerk. McKinney & Harrison, for plaintiff,] which is in words to wit:

Circuit court for the northern district of Texas, October term 1882.

T. M. Shirley
vs.
Waco Tap R. R. Co. et al. } No.

To the Hon. A. P. McCormick, judge, &c.

Now comes the plaintiff, T. M. Shirley, in the above numbered and entitled cause, by his attorneys, and moves the court to remand this cause to the district court for the county of McLennan, state of Texas, from whence this cause was removed into this court
281 on petition of defendants herein, alleging as a reason the citizenship of this plaintiff to out of the state of Texas, filed in said court, May 20, 1882, and upon which petition this cause was removed into this court, and is here now pending, because

this court has not jurisdiction to try and render final judgment in the same on the merits, for reasons as follows:

First. This plaintiff was a *bona fide* citizen of the state of Texas at the time of filing the original petition in this cause, in said district court for McLennan county, Texas, July, 1870, as is of record in this cause; and the allegation of said petition for removal of citizenship, on Nov. 10th, 1881, is not sufficient for the removal.

Second. The defendants herein, John T. Flint, W. R. Kellum et al., the petitioners for removal, are not such new parties as they allege in said petition for removal, as entitle them to the removal, nor does the rights and interests they represent as trustees, as appears of record in this cause, entitle them to the removal, be-
282 cause they were made parties at the said November term, 1881, of said state court, as statutory trustees for the Waco Tap R. R. company, the original defendants herein, and as to them and the rights and interests they represent there has been no change in the status of parties since the institution of this suit.

Third. The petition for removal does not, nor does the record of this cause, disclose any controversy in which there can be a final determination so far as concerns the defendants, John T. Flint, W. R. Kellum, et al., without the presence of the Houston and Texas Central Railway company, the other defendants herein, and the said Houston and Texas Central Railway company is not in any manner entitled to the removal.

And this plaintiff prays that this cause may be remanded to said district court for McLennan county.

E. A. McKINNEY,
THOMAS HARRISON,
for Plaintiff.

283 *Order remanding case to district court McLennan county.*

United States circuit court for the northern district of Texas, at Waco.

WEDNESDAY, *October 18th, A. D.* 1882.

Be it remembered that at a term of the circuit court of the United States, fifth circuit, for the northern district of Texas, at the city of Waco, on the 18th day of October, A. D. 1882—present and presiding, Hon. Don. A. Pardee, circuit judge; also present, Hon. A. P. McCormick, district judge; J. C. Bigger, United States attorney; J. A. McKee, U. S. marshal; and J. H. Finks, clerk—among other, the following proceedings were had:

T. M. Shirley
vs.
The Waco Tap R. R. Co. et al.

OCTOBER 18, 1883.

And now on this, the 18th day of October, and the October term of this court, came on to be heard in this cause the motion to re-

mand the same to the district court for McLennan county, Texas,
from whence it had been removed on petition of the de-
284 fendants herein, and all parties appearing by their attor-
neys, announced themselves ready for the motion. The same was then submitted to the court, and after hearing argument of counsel, and fully considering the same, it is the opinion of the court that the law is with the motion, and that the prayer of the same be granted; and it is therefore ordered and adjudged that this cause be remanded to the said district court of McLennan county, Texas, from whence it came, for want of jurisdiction in this over the same, and that the same had been improperly removed from said court, and that the defendants herein pay all costs attendant upon this proceeding.

285 *Appeal by Def't.*

United States circuit court for the northern district of Texas, at Waco.

FRIDAY, *Octo.* 19, 1883.

Be it remembered that at a term of the circuit court of the United States, 5th circuit and northern district of Texas, at the city of Waco, on the 20th day of October, A. D. 1882—

Present, Hon. Don A. Pardee, judge, presiding; and also, Hon. A. P. McCormick, district judge, being present, and the U. S. attorney, U. S. marshal, and the clerk—among other things had and done, the following was entered of record, to wit:

T. M. Shirley
vs. } No. 92.
The Houston and Texas Central Railway Co. et. al.

OCTOBER 20th, 1882.

On this the 20th day of October, A. D. 1882, came into open court the defendants by their attorneys, and pray for and give notice of an appeal to the supreme court of the United States from
the judgment of this court, rendered herein at a former day
286 of this term, remanding this cause to the district court of
McLennan county, Texas, whence said cause was removed to this court, which appeal is allowed and notice thereof here now entered of record.

Petition for Am't of Bond.

[(Endorsed, to wit:) No. 92; T. M. Shirley *vs.* Waco Tap R. R. Co., Houston and Texas Central Railway company; Filed Dec. 15th, 1882; J. H. Finks, clerk.]

Which is in words and figures as follows, to wit:

287 In the circuit court of the United States, northern district of Texas, at Waco.

Thomas M. Shirley, complainant,
vs.
Waco Tap R. R. company, Houston and Texas Central Railway company, John T. Flint, W. R. Kellum, Rich'd Coke, W. R. Baker, Wm. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, A. Groesbeck, defendants. } No. 92.

To the Honorable A. P. McCORMICK, one of the judges of the circuit court of the United States for the northern district of Texas, at Waco:

The above-named defendants respectfully showeth unto your honor that heretofore (to wit, on the 18th day of October, 1882) a decree was rendered in the above-entitled cause remanding the same to the district court of McLennan county, Texas, whence it came; from which decree the said above-named defendants
288 appealed to the supreme court of the United States, which appeal was allowed by the court and notice thereof entered of record.

The said defendants now pray your honor to fix the amount of the bond for appeal and supersedeas, and will ever pray, &c.

GEO. GOLDTHWAITE,
Solicitor for def'ts.

Bond fixed at the sum of two thousand dollars.

A. P. McCORMICK,
Dist. judge.

Dec. 14, 1882.

Bond.

[(Endorsed, to wit:) No. 92; T. M. Shirley *vs.* Waco Tap R. R. Co., Houston and Texas Central Railway Co.; filed and approved this the 15th day of December, A. D. 1882; J. H. Finks, clerk U. S. circuit court at Waco.] Which is in words and figures, to wit:

In the circuit court of the United States, northern district of Texas, at Waco.

289 Thomas M. Shirley, complainant,
vs.
Waco Tap R. R. Co., Houston and Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke, W. R. Baker, Wm. J. Hutchings, Cor. Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, A. Groesbeck, defendants. } No. 92.

Know all men by these presents that we, the Houston & Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke, W. R. Baker, W. J. Hutchings, Cornelius Ennis, F. A. Rice,

R. M. Elgin, Paul Bremond, and A. Groesbeck as principals, and —— and —— as sureties, are held and firmly bound unto Thos. M. Shirley, of the state and county of New York, in the sum of two thousand dollars, to be paid to the said Thomas M Shirley, his executors and administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally
290 and our and each of our heirs, executors, administrators, and executors, firmly by these presents. Sealed with our seals, using scrolls for seals, except the Houston & Texas Central Railway company, which affixes its common seal, this 13th day of December, A. D. 1882.

Whereas the above-named Houston & Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke, W. R. Baker, Wm. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, and A. Groesbeck have taken an appeal to the supreme court of the United States to reverse the decree rendered in the above-entitled suit on the 18th day of October, A. D. 1882, by the circuit court of the United States for the northern district of Texas, at Waco, remanding said suit to the district court of McLennan county, Texas, whence it came for want of jurisdiction, and that the same had been improperly removed said from last-mentioned court;

Now, therefore, the condition of this obligation is such that if the above-named Houston & Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke, W. R. Baker, W. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul
291 Bremond, and A. Groesbeck shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

[SEAL.] HOUSTON & CENTRAL RAILWAY CO.,
By G. JORDAN, *Vice-Pres't.*
Attest: A. S. RICHARDSON, *Sec'ty.*
W. J. HUTCHINGS. [SEAL.]
F. A. RICE. [SEAL.]
A. GROESBECK. [SEAL.]
W. R. BAKER. [SEAL.]
ROBT. M. ELGIN. [SEAL.]
W. D. CLEVELAND, [SEAL.]
S. K. McILHENNY, [SEAL.]
Securities.
Approved: A. P. McCORMICK,
Dec. 14, 1882. *Dist. Judge.*

292 The United States of America to Thomas M. Shirley, greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden at Washington on the

second Monday of October next, pursuant to an appeal given in open court on the 20th Octo., 1882, wherein Waco Tap R. R. co., Houston & Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke, W. R. Baker, Wm. J. Hutchings, Cornelius Ennis, F. A. Rice, R. M. Elgin, Paul Bremond, A. Groesbeck, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, chief justice of the supreme court of the United States of America, and the seal of the circuit court thereof, at Waco, this 28th day of Sept., in the year of our Lord one thousand eight hundred and eighty-three.

J. H. FINKS, *Clerk.*

293 On this 28th day of Sept., in the year of our Lord one thousand eight hundred and eighty-three, personally appeared before me, the subscriber, William Burge, a deputy United States marshal for the northern district of Texas, at Waco, and makes oath that he delivered a true copy of the within citation to E. A. McKinney, an attorney of record for the defendant in error, Thomas M. Shirley.

WM. BURGE.

Sworn to and subscribed before me this Sept. 28, A. D. 1883. Witness my hand and the seal of the United States circuit court, at Waco.

[SEAL.] J. H. FINKS, *Clerk.*

(Endorsed:) Citation in error. Issued by the clerk Sept. 28, 1883. J. H. Finks, clerk.

294 I, J. H. Finks, clerk of the circuit court of the United States, 5th circuit, in and for the northern district of Texas, at Waco, certify that the foregoing two hundred and ninety-seven pages in writing contain a true and complete transcript of the record and all proceedings had as they appear of file and record in this court in cause No. 92, entitled Thomas M. Shirley *vs.* the Waco Tap Railroad co. et als.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Waco, this 29th day of September, A. D. 1883.

[SEAL.] J. H. FINKS, *Clk.*

(Endorsed on cover:) N. Texas, C. C. U. S. No. 1083. The Houston & Texas Central Railway company, John T. Flint, W. R. Kellum, Richard Coke et al., appellants, *vs.* Thomas M. Shirley. Filed 10th October, 1883. 294 pages.